(23,924)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 289.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

STINEMAN COAL MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 19, 1914.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Pennsylvania before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Pennsylvania Railroad Company, Appellant, and Stineman Coal Mining Company, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction

2 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Pennsylvania Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the District Court of the United States, E. D. Penna.]

W. W. CRAIG,
Clerk District Court United States,
Eastern District of Pennsylvania.

Allowed by—
D. NEWLIN FELL,
Chief Justice of the Supreme Court
of the State of Pennsylvania.

3 Know all men by these presents, That we, The Pennsylvania Railroad Company, as principal, and The Title Guaranty and Surety Company, as sureties, are held and firmly bound

unto the Stineman Coal Mining Company, in the full and just sum of Thirty thousand (30,000) dollars, to be paid to the said Stineman Coal Mining Company, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this first day of July, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the Supreme Court of Pennsylvania, in a suit depending in said Court, between The Pennsylvania Railroad Company, appellant, and the Stineman Coal Mining Company, appellee, a judgment was rendered against the said The Pennsylvania Railroad Company, and the said The Pennsylvania Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Stineman Coal Mining Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Pennsylvania Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

4 THE PENNSYLVANIA RAILROAD COMPANY,
By GEO. D. DIXON, [SEAL.]
Vice-President.

Attest:
LEWIS NEILSON, [SEAL.]
Secretary.

Sealed and delivered in presence of—
JOS. RICHARDSON,
As to G. D. D.
GEO. F. NORTON,
As to L. N.

THE TITLE GUARANTY & SURETY COMPANY,
By HARRIS J. LATTA, [SEAL.]
Resident Vice-President.

Attest:
WILLIAM RARICH,
Resident Assistant Secretary.

Approved by—
D. NEWLIN FELL,
Chief Justice Supreme Court of Pennsylvania.

5 UNITED STATES OF AMERICA, *ss:*

To Stineman Coal Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Pennsylvania wherein The Pennsylvania Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, this first day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the Supreme Court of Pennsylvania, 1776.]

D. NEWLIN FELL,
Chief Justice of the Supreme Court of the State of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

On this third day of July, in the year of our Lord one thousand nine hundred and thirteen, personally appeared James P. O'Laughlin before me, the subscriber, Prothonotary and Clerk of the Court of Common Pleas of Clearfield County, Pennsylvania and makes oath that he delivered a true copy of the within citation to Alfred M. Liveright of the attorneys of record for the said Stineman Coal Mining Company, and read the original to said Liveright.

JAMES P. O'LAUGHLIN.

Sworn to and subscribed the third day of July, A. D. 1913.

[Seal Court of Common Pleas, Clearfield County, Pa.]

JOHN H. MOORE,
Proth'y & Clerk of the Court.

6 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

To the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania:

The Pennsylvania Railroad Company, the appellant in the above entitled action, respectfully shows:

The plaintiff, a shipper of bituminous coal over the lines of your petitioner, obtained a judgment in the Court below because of the alleged failure of your petitioner to deliver to it all the cars which it asserted it would have received had your petitioner made a proper allotment and distribution of those which it had available for distribution among its shippers, and this judgment has since been affirmed by the Supreme Court of Pennsylvania, and a final judgment in said action consequently obtained by the plaintiff therein.

As disclosed by the Record of the case, during the period of the action the defendant was engaged in interstate commerce or transportation, and the bituminous coal transported by it was transported to points both within and without the State of Pennsylvania. Its coal cars were used indiscriminately for intra and interstate shipments, and in making distribution thereof among its shippers, your petitioner made but one distribution, the cars delivered to the shippers being available at their option for shipments to points either within or without the State.

The plaintiff shipped to points both within and without the State, and the additional shipments which it would have made had additional cars been available would have been so made.

6½ Both in the Court below and in the Supreme Court of Pennsylvania your petitioner, as the Record discloses, contended that in making distribution of its coal cars it was subject to the provisions of the Acts of Congress, known as the "Interstate Commerce Acts," and to those alone, and that consequently actions based upon alleged failure to make proper and lawful distribution of its cars were not cognizable in State Courts, but only in the Federal tribunals, this being the result, as your petitioner contended, of the provision contained in Section 9 of the said Interstate Commerce Act, to the following effect:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any district or circuit court of the United States of competent jurisdiction."

The contention thus made and advanced upon the part of your petitioner was overruled by the Court below, and also by the Supreme Court of Pennsylvania.

It further appeared from certain orders of the Interstate Commerce Commission which, as the Record in the case discloses, were given in evidence, that that body had defined and prescribed the character and method of distribution of their cars to be observed and pursued by carriers subject to the provisions thereof, and it was stipulated by the parties to the cause that if the method of distribution prescribed in and by said orders was that which should have been observed by your petitioner in the period of the action, the plaintiff was not entitled to recover, but, on the contrary, the verdict should be in favor of your petitioner. Such stipulation further provided that if the method prescribed in said orders was not that which should have been observed and followed by your

petitioner, then the verdict should be in favor of the plaintiff in the action.

Your petitioner both in the Court below and in the Supreme Court of Pennsylvania contended that by virtue of the provisions of the said Interstate Commerce Acts, the method of distri-
7 bution prescribed and defined in and by said orders of the Interstate Commerce Commission was the lawful and proper one, and that consequently under the stipulation aforesaid, it was entitled to a verdict in its favor. This contention the Court below overruled, and directed that a verdict should be entered in favor of the plaintiff, and its action in this respect has been approved by the Supreme Court of Pennsylvania, and the judgment entered in the Court below upon said verdict has been affirmed by the said Supreme Court.

As a result of the overruling of the contentions thus advanced upon behalf of your petitioner, a final judgment has been entered against it in a case in which the decisions of both the lower Court and the Supreme Court of Pennsylvania have been against a right, privilege or immunity claimed and asserted by your petitioner under the Constitution and Statutes of the United States, and in favor of an authority exercised under and pursuant to a law of the State of Pennsylvania, notwithstanding the contention of your petitioner that such authority was not properly exercisable on the ground of its repugnancy to the Constitution and laws of the United States.

Your petitioner, being desirous of having such final judgment reviewed by the Supreme Court of the United States, prays that a writ of error for this purpose may be allowed.

And it will ever pray, etc.

[Seal The Pennsylvania Railroad Company, Incorporated 1846.]

THE PENNSYLVANIA RAILROAD COMPANY,
By GEO. D. DIXON, *Vice-President.*

Attest:
LEWIS NEILSON, *Secretary.*

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Lewis Neilson, being duly sworn, according to law, deposes and says that he is the Secretary of the Pennsylvania Railroad Company, the petitioner herein, and that the facts contained and set forth in the above and foregoing petition are true to the best of his knowledge, information and belief.

LEWIS NEILSON.

Sworn and subscribed before me this first day of July, 1913.

[Seal Henry E. Cain, Notary Public, Philadelphia, Pa.]

HENRY E. CAIN,
Notary Public.

Commission expires February 21, 1915.

[Endorsed:] No. 53. January Term, 1913. In the Supreme Court of Pennsylvania, Eastern District. Stineman Coal Mining Company vs. Pennsylvania Railroad Company. Petition for Allowance of Writ of Error to Supreme Court of the United States. Francis I. Gowen.

8 In the Supreme Court of the United States, — Term, 1913.

No. —.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
STINEMAN COAL MINING COMPANY, Defendant in Error.

In Error to the Supreme Court of Pennsylvania.

Specifications of Error.

1. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"1. The Court below erred in overruling the defendant's motion to dismiss action for want of jurisdiction of the Court below to entertain the same."

2. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"2. The Court below erred in refusing to charge as requested in the defendant's first point, which point was as follows:

"'1. The plaintiff is not entitled to recover because this court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by the Acts of Congress, commonly known as the "Interstate Commerce Acts," in the Federal tribunals.'"

3. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"3. The Court below erred in refusing to charge as requested in the defendant's second point, which point was as follows:

"'2. As it is admitted that if the distribution made by the defendant throughout the period of the action had been in accordance with the system or method which the Interstate Com-
9 merce Commission has prescribed and defined in the decisions and orders given in evidence as that which should govern the distribution by a carrier of cars, the plaintiff would not have received any more cars than were actually delivered to it by the defendant, the plaintiff is not entitled to recover, and your verdict should be for the defendant.'"

4. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"4. The Court below erred in refusing to charge as requested in the defendant's fourth point, which point was as follows:

"'4. Under the law and the evidence the plaintiff is not entitled to recover.'"

5. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"5. The Court below erred in overruling the defendants' motion for judgment non obstante veredicto."

6. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:

"6. The Court below erred in entering judgment on the verdict in favor of the plaintiff."

FRANCIS I. GOWEN,
H. W. B.,
Attorney for Plaintiff in Error.

[Endorsed:] No. —. — Term, 1913. In the Supreme Court of the United States. Pennsylvania Railroad Company, Plaintiff in Error, vs. Stineman Coal Mining Company, Defendant in Error. In Error to the Supreme Court of Pennsylvania. Specifications of Error. Francis I. Gowen.

10 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

Upon the representation of counsel it appearing that the Clerk of this Court will not be able to prepare and complete the Transcript of Record in this case within the time limited in the citation, it is hereby this — day of July, 1913, ordered that the time for filing said Transcript of Record in the Supreme Court of the United States be, and the same is, hereby extended until the fifteenth day of October, 1913.

D. NEWLIN FELL.

11 C. P., Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Statement.

The Stineman Coal Mining Company files this statement of its claim and demand against the Pennsylvania Railroad Company, the defendant, and for cause of action, alleges as follows, viz:

First. That the Stineman Coal Mining Company is a corporation organized and existing under the laws of Pennsylvania, and from the 1st day of April A. D., 1902, to the 1st day of January A. D.,

1905, was the owner of a leasehold upon a large body of bituminous coal, situate in the County of Cambria, State of Pennsylvania, and was engaged in the business of mining, producing, shipping and selling bituminous coal thereon and therefrom, to points and places within the territorial limits of Pennsylvania.

Second. That the Pennsylvania Railroad Company is a corporation existing under the laws of Pennsylvania, by an Act of Assembly approved the 13th day of March, 1946, [1846] and is by virtue of the laws and constitution of the said State, a common carrier engaged in the transportation of passengers and property, under a common control, management or arrangement for a continuous carriage or shipment from points and places within the State of Pennsylvania, to other points and places within the said State, and was and is engaged in carrying, hauling and transporting bituminous coal from points and places along its main line and branches within said State, to other points and places within said State.

Third. That the mines of the plaintiff and the mines of other shippers of bituminous coal, especially those of the Berwind-White Coal Mining Company are situated along or near the line or branch line of the defendant company in the County of Cambria, and that a large part of the coal mined and shipped from the premises controlled by the plaintiff during the period from the 1st day of April A. D., 1902, to the 1st day of January A. D., 1905, was
12 shipped over said main line and branch of the defendant company by continuous carriage or shipment, and under the control and management of the defendant company, to points and places within the State of Pennsylvania.

Fourth. That the defendant company during all of the period aforesaid arbitrarily assumed the right to estimate and determine the capacity of the plaintiff to produce coal from its mines, and did in fact estimate, fix and determine, and publish the capacity of its mines, and did estimate, fix and determine the percentage of coal cars plaintiff was to receive each and every working day at its mines for use in the carriage and transportation of its product, and did in like manner estimate, fix and determine the producing capacity of all other mines upon its main line and branch lines, and did so fix and determine the percentage of coal cars the said several operators and owners of mines were entitled to have and receive for the carriage and transportation of the product of their mines.

Fifth. That the duty and obligation of the defendant company as a common carrier and a public highway was to furnish coal cars to the plaintiff upon a basis of equality in proportion to its rated capacity to mine and produce coal, and according to the measure of duty fixed by itself in determining the percentage of the number of coal cars to which plaintiff was entitled out of the whole number the defendant had for daily distribution; but the defendant company disregarding its duty and obligation which it owed to the plaintiff, did unduly and unreasonably, as well as unlawfully and unjustly, neglect and refuse to furnish the plaintiff with its pro rata share of the coal cars it had for daily distribution, and did subject the plaintiff to undue and unreasonable disadvantage and prejudice,

in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, in that it did in the daily distribution of its coal cars, distribute and give to said company five hundred (500) cars before distributing to the
13 plaintiff any cars; and did thereby unjustly and unlawfully deprive the plaintiff of the just and fair amount of cars each day, to which the percentage fixed by the defendant company entitled the plaintiff to receive and would have received, except for said unjust, undue and unreasonable discrimination in favor of the said Berwind-White Coal Mining Company.

Sixth. That the defendant company did also unduly and unreasonably discriminate against the plaintiff and in favor of said Berwind-White Coal Mining Company, to the prejudice and disadvantage of the plaintiff, in that the said defendant did cause to be transferred from its ownership, custody and control, one thousand (1000) steel cars of large capacity, which it had purchased for use in the transportation of bituminous coal into interstate markets and places of interstate commerce to the said Berwind-White Coal Mining Company, and did by said transfer and sale *deprive* the plaintiff from receiving its pro rata percentage of said one thousand cars for use in hauling and transporting the product of its mines, to points and places within the State of Pennsylvania.

Seventh. That during all of said period of time, to wit, from the 1st day of April, A. D., 1902, to the 1st day of January, A. D., 1905, the plaintiff had a large and growing demand for the soft coal which it was mining and producing; that it had during all of said time constant demand and orders for its coal, in excess of the supply of coal cars furnished by the defendant company for transportation of the same to its customers, and could and would have mined and shipped a large amount of coal in excess of what it did mine and ship, to wit, 18,321 tons, which it would have sold to its customers therein at prices F. O. B. cars above costs of producing same; but was prevented from so doing by reason of the aforesaid undue and unreasonable discrimination in favor of the aforesaid Berwind-White Coal Mining Company. That because of said undue and unreasonable discriminatory acts, the plaintiff suffered
14 damage and loss in its business of mining and selling its product in the markets of the soft coal trade and in points and places and to consumers of soft coal within the lines of the State of Pennsylvania, and it, therefore, brings this action to recover compensation for said loss and damage in the sum of $13,899.61 *Dollars.*

Second Cause of Action.

For a second and separate cause of action, plaintiff repeats and renews each and every allegation contained in the preceding parts of this complaint, in which are averred certain discriminatory acts of the defendant company, with the same force and effect as though here again stated fully and at length, and further alleges:

(*a*) That the plaintiff's colliery or mine is situated along the main line of defendant company's railroad or highway, west of Altoona and east of Johnstown, and that along said main line of defendant's highway or railroad west of Altoona and east of Johnstown, were the collieries or mines owned and operated by the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company during the period of time, viz., from the 1st day of April A. D., 1902, to the 1st day of January A. D., 1905, the period of time covered by this action, and that the colliery or mine of the plaintiff and the said collieries and mines of the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company are connected with the defendant's railroad by short lines of railroad owned and operated by the plaintiff and said other companies named; that in the regular course of business, it was the practice of the defendant company during all of said period to deliver empty cars at the junction of its railroad with the railroad or branches leading to the several mines or collieries of the plaintiff and of the above named other companies, and for the respective owners of said mines or collieries to haul with their own motive power the empty coal cars to their respective mines to be loaded, and when loaded to haul them back and deliver them to the defendant at the point of connection where they were received from the defendant for transportation. That the service so rendered by the plaintiff and the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, was of a like and contemporaneous kind, of a like kind of traffic under substantially similar circumstances and conditions.

(*b*) That the defendant without the knowledge of the plaintiff allowed and paid to the said Altoona Coal & Coke Company and Glen White Coal & Lumber Company, directly or indirectly to other person or persons, for the benefit and use of said companies during all of the period of time aforesaid, the sum of fifteen (15) cents per ton, on all of the coal and coke which said companies respectively hauled and delivered from their said collieries and delivered to the defendant for transportation over its main line and connecting lines, but did not pay to the plaintiff any sum whatsoever for or on account of the coal which it in like manner, under like circumstances and under similar conditions delivered to the defendant for transportation over its main and connecting lines.

(*c*) That during the aforesaid period of time, the plaintiff hauled from its mine and delivered to the defendant for transportation to market, to points and places within the State of Pennsylvania, upwards of 44,971 tons of coal, and for the services so rendered the plaintiff is in like manner as the aforesaid Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, entitled to receive from the defendant company, the sum or price of fifteen (15) cents per ton. That to the extent of the payment aforesaid made to said companies, the defendant has unduly and unjustly discriminated against the plaintiff and in favor of said companies, and has violated its duty to plaintiff as a common carrier, and caused the plaintiff to suffer damage and loss in the sum of

$6735.65, in addition to the damage and loss set forth in the
16 preceding part of this statement, and the plaintiff seeks in this action, therefore, under the two causes of action set forth to recover the sum of $20,635.26, as its compensation for the loss and damages incurred.

STINEMAN COAL MINING CO.,
By KREBS & LIVERIGHT, *Attorneys.*

Filed Nov. 21, 1908. Roll B. Thompson, Prothontary.

17 C. P., Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur Motion for Leave to File Amended Statement.

Opinion.

Defendant objected to the allowance of the amendment asked for, for the following reasons: "First. That the changes introduced by plaintiff's proposed amended statement are not authorized by the statutes *of* amendments. Second. Because said amended statement proposes to introduce new causes of action from those averred and set forth in plaintiff's original statement. Third. Because said proposed amended statement embraces new causes and grounds of action not averred and set forth in plaintiff's original statement and this after the bar of the statute had intervened upon all the causes of action averred in plaintiff's original statement. Fourth. For the same reasons the defendant excepts to the application to amend the præcipe and writ."

The amended statement followed the allowance by the Court of the amended præcipe and writ so as to state the amount of damages larger than that in the original præcipe and writ.

18 An examination of the plaintiff's amended statement convinces us that the third clause thereof does introduce a new cause of action and it being more than six years since the right of action accrued that amendment, so far as covered by said third clause, cannot be allowed. The original statement declares wholly on discriminatory acts of the defendant, naming the persons and corporations in whose favor the defendant Company discriminated as against the plaintiff. The third clause of the amended statement declares wholly not upon discrimination but upon a violation of its constitutional, statutory and common law duty of furnishing, "an adequate and sufficient number of cars to meet its requirements." The amendment, so far as said third clause is concerned, is, therefore not allowed.

The balance of the amended statement follows in language the original declaration, except, first, as to excluding in several clauses thereof words and sentences respecting haulage or shipments made to points and places within the State of Pennsylvania; and second, in elaborating the results of alleged discrimination and in setting up a very much larger discriminatory tonnage of coal and in consequence a very much larger claim for damages. At first blush it would seem as though the amended statement were an attempt to declare for coal belonging to that class of tonnage traffic called interstate, while the original declaration, in using the words confining it to shipments within the State of Pennsylvania, confined recovery to that class of tonnage traffic known as intrastate. The learned Counsel for plaintiff, however denies such purpose or intention, and it is clear that the law will not permit a recovery for interstate shipments, so that even though the amendment were allowed any attempt to recover for distinctively interstate shipments will not be allowed by the Court on trial. In other words, the amendment will not avail them for such purpose. The words with reference to the State of Pennsylvania in the original statement, are excluded from the amended statement it is claimed
19 merely because they are surplusage. With this view of the case there perhaps is no harm in allowing the amendment so far as the exclusion of the reference to the State of Pennsylvania is concerned.

The principal objection made by the learned Counsel for the defendant to the statement is, that a new cause of action is introduced by the amended section eighth, corresponding to section seventh of the original statement. A careful examination of both statements convinces us that no new cause of action is in fact declared on. In both, two particular acts of discrimination are alleged, namely, first, the distribution to Berwind-White Coal Mining Company daily of 500 cars before any distribution made of a pro rata to the plaintiff Company; and second, the sale by the defendant Company to Berwind-White Coal Mining Company of 1000 steel cars of large capacity, thereby depriving the plaintiff of its pro rata percentage of said cars. Both statements cover the same period of time and allege identically the same discriminatory acts. In the original statement, however, plaintiff alleges a certain definite number of tons of coal which it could have shipped in excess of what it did ship, being prevented so to do by reason of the alleged two undue and unreasonable acts of discrimination in favor of Berwind-White Coal Mining Company. In the amended statement, although in somewhat different language, the same allegation is made, that is, that it could have mined and shipped a large amount of coal in excess of what it did mine and ship and claims for the profit thereon as in the original statement except that it claims for a very much larger amount of tonnage which it was deprived from shipping by reason of the discriminatory acts of the defendant and in consequence declares for a much larger sum of money. We are of opinion, therefore, that all that portion of the amended statement exclusive of section three is allowable. The cause of action, in our judgment, is

the same, that is, two certain alleged discriminatory acts. The amendment appears to declare merely on the consequences of those discriminatory acts and alleges aggravation of the injury,
20 in that they were prevented from shipping a larger amount of tonnage and therefore entitled to a larger amount of damage than was claimed for in the original statement.

In Knapp vs. Hartung, 73 Pa. St. 290-294 is a case almost identical in principle with the case in hand. In that case the Supreme Court reversed the lower Court for striking off amendments declaring for a number of additional items, on the ground that both statements were based on the same cause of action, namely, the breaking of the close. That case also lays down the principle that the amendment acts must receive a liberal construction. In a number of cases in Pennsylvania, where the amended statement did not vary from the original statement in an allegation as to the particular language, action or acts alleged as the basis of recovery, but where the mode of stating the complaint or of setting out the circumstances together with a statement of the consequences and aggravation of the injury sustained has been modified or amended, such amendments have been allowed by the lower Courts and sustained by the higher Courts. Jackson vs. Gunton, 26 Superior Court 203. Herbstritt vs. Lackawanna Lumber Co., 212 Pa. St. 495. Fredericks vs. Penna. Canal Co., 148 Pa. St. 317. Very recent cases recognizing this principle are Call vs. Westinghouse Co., 230 Pa. St. 86 (in Advance Reports 17 March 1911). First National Bank vs. Slate Co., 229 Pa. St. 227 (in Advance Reports November 18th, 1910). Amended statements increasing claim for damages are permitted. See Tassey vs. Church, 4 Watts & Sargent 141. Clark vs. Herring, 5 Binney 133. Stainer vs. Insurance Co., 13 Superior Court 25.

The cases relied on by the learned Counsel for defendant are clear cases where the amended statement introduced new or different causes of action barred by the statute. Allen vs. Tuscarora Valley Railroad Co., 229 Pa. St. 97 (in Advance Reports November 25th, 1910) was where the original declaration alleged negligence
21 of the defendant Company in failing to comply with its duty of furnishing car couplers of reasonable safety, while the amended declaration alleged that the defendant corporation was engaged in interstate commerce and as a common carrier so engaged failed to equip its cars as required by an Act of Congress. This was held to be introducing a new cause of action barred by the statute, and of that there can hardly be two opinions. In Philadelphia vs. Railroad Co., 203 Pa. St. 38, cited by Counsel, the suit was by the City against the Railroad Company to recover the cost of paving streets occupied by the tracks of the Company. The original statement did not aver any charter, contractual or statutory obligation on the Railroad Company to pay the cost of paving the streets, and hence when the City, after the statute of limitations had run against its claim, attempted to amend its statement so as to aver that the defendant Company had by lease or merger acquired the franchises and assumed the burden of another railway company which had the obligation of paving the streets, it was held that such averment intro-

duced an entirely new cause of action. In Mitchell Coal & Coke Co. vs. Pennsylvania Railroad Co., manuscript opinion by Ferguson, J., July 13, 1910, in the Court of Common Pleas No. 3 of Philadelphia to No. 545 March Term, 1905, the attempted amendment was the introduction of other and different names of companies or corporations in favor of whom the defendant Company had discriminated as against the plaintiff Company, and hence is not this case.

Here, as before stated, two distinctive alleged discriminatory acts are averred, exactly similar in both the original and amended statements. The effect, consequences or results of those acts is made a matter of amendment and of an enlarged claim for damages. We fail to see where any new cause of action is alleged.

In this case there is a second and separate cause of action declared on, both in the original and amended statements. What has been said with respect to the first cause of action applies equally
22 to the second. The cause of action in the amended statement is the same cause of action declared on in the original statement, the only difference in the amendment being that a very much larger tonnage of coal is alleged to have been delivered to the defendant for transportation to market on which the 15 cents per ton rebate allowed to other companies is claimed.

The amended statement, exclusive of clause three, is therefore allowed and directed to be marked filed.

At request of Counsel for defendant, an exception is noted and bill sealed.

By the Court.

ALLISON O. SMITH, *P. J.*

Clearfield, Pa., April 13th, 1911.

Filed Apr. 13, 1911. Roll B. Thompson, Prothonotary.

23 C. P., Clearfield County, May Term 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Amended Statement.

The Stineman Coal Mining Company files this statement of its claim and demand against the Pennsylvania Railroad Company, the defendant, and for cause of action alleges as follows, to-wit:

First. That the Stineman Coal Mining Company is a corporation organized and existing under the Laws of Pennsylvania, and from the first day of April, A. D. 1902, to the first day of January, A. D. 1905, was the owner of a leasehold upon a large body of bituminous coal situate in the County of Cambria, State of Pennsylvania; and was engaged in the business of mining, producing, shipping and selling bituminous coal thereon and therefrom to various points and places;

24 Second. That the Pennsylvania Railroad Company is a corporation existing under the Laws of Pennsylvania by an Act of Assembly approved the 13th day of March 1846, and is by virtue of the Laws and Constitution of the said State a common carrier engaged in the transportation of passengers and property, and was and is engaged in carrying, hauling and transporting bituminous coal; and undertook and agreed, in consideration of the franchises to it granted by the Commonwealth of Pennsylvania, to give and grant unto the plaintiff the facilities necessary for the transportation of its coal to market without discrimination in favor of other companies, corporations or individuals; and to furnish it with cars and motive power without any preference to other companies, corporations or individuals; but the defendant has failed and refused to perform its duty thus imposed upon it in the manner and to the extent hereinafter narrated;

Third. That under the Constitution and Laws of this Commonwealth, as well as at common law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal, is by law required to furnish and provide at all times during the ordinary conditions and demands of the bituminous coal trade, an adequate and sufficient supply of coal cars owned and in use by it, and to be provided by it for the transportation of bituminous coal over its main line and branches, for the accommodation and use of the persons, firms and corporations engaged in mining and producing bituminous coal in the regions tributary to the defendant's main line and branches; and to let and hire the same to all persons, firms and corporations engaged in mining and producing bituminous coal from bituminous coal regions tributary, as aforesaid, to its main line and branches in the counties of Blair, Cambria, Clearfield, Westmoreland and Indiana and elsewhere; and to let and hire the same unto the plaintiff in this action. That the defendant company did not, as required by law, provide coal cars adequate and sufficient

25 in quantity to meet the ordinary demands of its patrons, persons, firms and corporations, mining and producing bituminous coal in the regions aforesaid, and did not furnish and provide to the plaintiff such adequate and sufficient supply of coal cars as would enable it to mine, produce and have transported to market, during the ordinary conditions and demands of the market for bituminous coal, the amount of coal it could and would have mined, produced and shipped, had defendant company performed its duty in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market, a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and caused to be transported had it been furnished with an adequate and sufficient supply of coal cars for such use and purpose, by reason of which failure in the performance of its duty and legal obligation, the defendant caused the plaintiff to suffer great damage, to wit:—damage in the sum of Seventy-nine Thousand One Hundred forty-one and 20/100 Dollars ($79,141.20).

Fourth. That the mines of the plaintiff and the mines of other shippers of bituminous coal, especially of the Berwind-White Coal Mining Company, are situate along or near the line, or branch line, of the defendant company in the county of Cambria, and adjoining counties, and that a large part of the coal mined and shipped from the premises controlled by the plaintiff, during the period from the 1st day of April 1902 to the 1st day of January 1905, was shipped over said main line and branches of the defendant company;

Fifth. That the defendant company, during all of the period aforesaid, arbitrarily assumed the right to estimate and determine the capacity of the plaintiff to produce coal from its mines, and did in fact estimate, fix and determine and publish the capacity of its mines, and did estimate fix and determine the percentage of coal cars plaintiff was to receive each and every working
26 day at its mines for use in the carriage and transportation of its product; and did in like manner estimate, fix and determine the producing capacity of all other mines upon its main line and branch lines, and it so fixed and determined the percentage of coal cars the said several operators and owners of mines were entitled to have and receive for the carriage and transportation of the product of their mines:

Sixth. That the duty and obligation of the defendant company, as a common carrier and public highway, was to furnish coal cars to the plaintiff upon a basis of equality in proportion to its rated capacity to mine and produce coal, and according to the measure of duty fixed by itself in determining the percentage of the number of coal cars to which plaintiff was entitled out of the whole number that defendant had for daily distribution; but the defendant company, disregarding its duty and obligation which it owed to the plaintiff, did unduly and unreasonably, as well as unlawfully and unjustly, neglect and refuse to furnish the plaintiff with the pro rata share of coal cars which it had for daily distribution, and did subject the plaintiff to undue and unreasonable disadvantage and prejudice in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, in that it did in the daily distribution of its coal cars distribute and give to said company five hundred cars (500) before distributing to the plaintiff any cars; and did thereby unjustly and unlawfully deprive the plaintiff of the just and fair amount of cars each day which the percentage fixed by the defendant company entitled the plaintiff to receive, and which it would have received except for said unjust, undue and unreasonable discrimination in favor of said Berwind-White Coal Mining Company;

Seventh. That the defendant company did also unduly and unreasonably discriminate against the plaintiff and in favor of
27 the said Berwind-White Coal Mining Company, to the prejudice and disadvantage of the plaintiff, in that the said defendant did cause to be transferred from its ownership, custody and control, to the said Berwind-White Coal Mining Company, one thousand (1000) Steel cars of large capacity, which it, the defend-

ant, had purchased for use in the transportation of bituminous coal, and did by said transfer and sale deprive the plainitff from receiving its pro rata percentage of said one thousand cars for use in hauling and transporting the product of its mines;

Eighth. And during all of said period of time from the 1st day of April 1902 to the 1st day of January 1905 the plaintiff had a large and growing demand for the soft coal which it was mining and producing; that it had, during all of said time, constant demand and orders for its coal in excess of what could be moved in the supply of coal cars furnished by defendant company for transportation of the same to plaintiff's customers, and it could and would have mined and shipped a large amount of coal in excess of what it did mine and ship, all of which it could and would have sold at a price aggregating f. o. b. cars, above the cost of producing same, the sum of Seventy-nine Thousand One Hundred forty-one and 20/100 Dollars (79,141.20); but was prevented from so doing by reason of the aforesaid undue and unreasonable discrimination in favor of the aforesaid Berwind-White Coal Mining Company. That said sum of $79,141.20 aggregates the reasonable profit that plaintiff could and would have made upon the coal it reasonably could and would have shipped from its mines in the following amounts, but for defendant's discriminatory acts:—

In 1902	6,793 tons
In 1903	55,660 tons
In 1904	51,098 tons

and because of said undue and unreasonable discriminatory acts of the defendant hereinbefore narrated, the plaintiffs suffered
28 damage and loss in its business of mining and selling its product as hereinbefore set forth, and it, therefore, brings this action to recover from the defendant compensation for said loss and damage in the said sum of $79,141.20 with such additional amount as will compensate plaintiff for the delay on the part of the defendant company.

For a second and separate cause of action plaintiff repeats and renews each and every allegation contained in the preceding points of this complaint, in which are averred discriminatory acts of the defendant company, with the same force and effect as though they were again stated fully and at length, and further alleges:—

"a." That the plaintiff's collieries or mines are situated along the main line of defendant company's railroad or highway, west of Altoona and east of Johnstown, and that along said main line of defendant's highway or railroad west of Altoona and east of Johnstown were the collieries or mines owned and operated by the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, during the period of time from the 1st day of April 1902, to the 1st day of January 1905, the period covered by this action; and that the collieries or mines of the plaintiff and the said collieries and mines of the said Altoona Coal & Coke Company and the Glen White Coal & Lumber Company are connected with the de-

fendant's railroad by short lines of railroad owned and operated by the plaintiff and said other companies named; that in the regular course of business it was the practice of the defendant company, during all of said period, to deliver empty cars at the junction of its railroad with the railroad or branch leading to the several mines or collieries of the plaintiff and of the above named other companies, and for the respective owners of said mines or collieries to haul with their own motive power the empty coal cars to the respective mines to be loaded, and when loaded to haul them back and deliver them to the defendant at the point of connection where they were
29 received from the plaintiff for transportation. That the service so rendered by the plaintiff, and by the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, was of a like and contemporaneous kind, of a like kind of traffic under substantially similar circumstances and conditions;

"*b.*" That the defendant, without the knowledge of the plaintiff, allowed and paid to the Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, directly or indirectly to other person or persons for the benefit and use of said Companies during all of the period of time aforesaid, the sum of fifteen cents (15¢) per ton on all of the coal and coke which said companies respectively hauled and delivered from their said collieries and delivered to the defendant for transportation over its main line and connecting lines; and did not pay to the plaintiff any sum whatsoever for — on account of the coal which it in like manner, under like circumstances and under similar conditions, delivered to the defendant for transportation over its main and connecting lines;

"*c.*" That during the aforesaid period of time, the plaintiff hauled from its several mines, so situate as aforesaid, and delivered to the defendant for transportation to market, 552,288 tons of coal, and for the service so rendered the plaintiff is, in like manner as the aforesaid Altoona Coal & Coke Company and the Glen White Coal & Lumber Company, entitled to receive from defendant company thereupon the sum or price of fifteen cents per ton. That by reason of the payments aforesaid made to said companies similarly situated to plaintiff, and the failure and refusal of the defendant to make like payments to the plaintiff, the defendant has unduly and unjustly discriminated against the plaintiff and in favor of said other companies, and has violated its duty to plaintiff as a common carrier, and caused the plaintiff to suffer damage and loss in the sum of $82,843.20, in addition to the damage and loss set forth
30 in the preceding part of this statement; and the plaintiff seeks in this action, therefore, under the causes of action set forth, to recover from the defendant the sum of One Hundred Sixty-one Thousand Nine Hundred Eighty-four and 40/100 Dollars ($161,984.40), with compensation for delay from the date of the injuries committed.

KREBS & LIVERIGHT,
Attorneys for Plaintiff.

Filed April 13, 1911. Roll B. Thompson, Prothonotary.

31 May Term, 1908, C. P., Clearfield County.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Plea.

Now April 17, 1911, defendant by its attorneys hereby pleads the statute of limitation as to all of plaintiff's claim not covered by its original statement.

(Signed) MURRAY & O'LAUGHLIN,
Solicitors for Defendant.

Filed April 17, 1911. Roll B. Thompson, Prothonotary.

32 May Term, 1908, C. P., Clearfield County.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Motion to Dismiss Action for Want of Jurisdiction.

The Pennsylvania Railroad Company, the Defendant in the above entitled action, respectfully moves the Court to dismiss the same, except as to the second cause of action set forth in plaintiff's statement, for the following reasons:

1. It is a corporation organized and existing under the laws of the State of Pennsylvania, owning and operating a line of
33 railroad in that State and also in the States of New York and New Jersey, and is engaged in the transportation of passengers and freight between points in said States, and is, therefore, subject to the provisions of the Act of Congress, approved February 4, 1887, entitled, "An Act to Regulate Commerce," and the Acts amendatory thereof and supplementary thereto.

2. During the period of the present action and prior thereto it was engaged, inter alia, in transporting in interstate commerce coal mined by a large number of mine owners and operators located along its lines within the State of Pennsylvania, among whom was the plaintiff in the present action, and that in conjunction with such ransportation it was also engaged in the transportation of coal exclusively within the State of Pennsylvania for such owners and operators. That for the purpose of enabling shipments to be

made both to points beyond and within the State of Pennsylvania it owned, maintained and operated a large number of coal cars which were used by it for both intrastate and interstate shipments, no segregation or apportionment of these cars being made as between the two classes of shipments.

3. During the period of the action and prior thereto it had in force certain regulations providing for the distribution of its coal cars among shippers desirous of using the same, and in making this distribution it in no wise undertook to limit the use of the cars so delivered to any shipper to either intrastate or interstate shipments, but accepted and transported the cars when loaded to the destinations designated or prescribed by the shippers loading them without regard to the consideration whether these destinations were points beyond or within the State of Pennsylvania.

4. The Acts to Regulate Commerce above referred to by their terms prohibit unlawful or unjust discrimination in the distribution by any railroad company subject to their provisions of its
34 available equipment, and your petitioner is advised by counsel, and therefore avers, that by reason of the paramount authority possessed by the Congress of the United States in respect to any matter concerening which it is empowered to legislate, the provisions of the said Acts in relation to such discrimination are controlling, and that the remedies for violation thereof which are prescribed in and by said Acts are consequently exclusive of all others.

5. It results from this, as your petitioner is advised and avers, that action for the recovery of damages based upon disregard of provisions of the said Acts prohibiting discrimination in the allotment or distribution by a railroad company or carrier of any of its equipment are cognizable solely in the tribunals which the said Acts designate and prescribe as those in which such actions shall be maintained, and these tribunals are the Courts of the United States and the Interstate Commerce Commission, jurisdiction between the two being apportionable as prescribed in the said Acts.

6. Wherefore, your petitioner showing that this Court is without jurisdiction to entertain the present action, prays that an order may be made dismissing the same.

THE PENNSYLVANIA RAILROAD COMPANY,
By W. H. MYERS, *Vice-President.*

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Lewis Neilson, being duly sworn, according to law, deposes and says: That he is the Secretary of the Pennsylvania Railroad Company, the defendant in the above entitled action. That the
35 facts set forth in the above motion are true, and that the said motion has not been made for the purpose of delay.

LEWIS NEILSON.

Sworn and subscribed before me this 20th day of May, A. D. 1911.

H. E. CAIN,
Notary Public.

Commission expires February 21, 1913.

Filed June 5, 1911. Roll B. Thompson, Clerk.

36 C. P., Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Answer to Rule to Dismiss Action.

To the Honorable Allison O. Smith, President Judge:

The plaintiff, Stineman Coal Mining Company, making answer to the rule in the above case, and to the matters averred in the petition on which it is founded, respectfully says:

1. The matters set forth in paragraph one are believed to be true, and those alleged in paragraphs two and three of the petition are purely defensive and not material at this stage of the cause, even if true. Their truth can be determined only on the trial.

2. That the force and effect of the Act to Regulate Commerce, approved February 4, 1887, and the supplements and amendments thereto, in no way concern this case at this stage, and the attempt by defendant to interject the same is palpable design to confuse.

3. That the matters averred in the fifth paragraph of the
37 petition are purely academic, and assume a state of facts to exist that is not yet proven, and cannot be in proof until trial had.

4. That it denies that this Court is without jurisdiction to entertain the present action, and avers that the allegations of the petition are entirely matters of defense after plaintiff's testimony shall have been presented.

5. That defendant's entire petition is premature and without warrant of law, is an effort to have the Court prejudge the case without any proofs having been made therein, seeks to have the Court give binding instructions for defendant without a jury even sworn, and is otherwise irregular.

6. That the Act of Congress of February 4, 1887, and its supplements and amendments do not and cannot apply to the matters for which suit is brought in this action.

7. That even if the allegations of fact contained in the petition were true as stated, defendant has shown nothing thereby to defeat the jurisdiction of the Common Pleas of Clearfield County.

Wherefore the plaintiff moves the Court to discharge the rule herein granted.

[CORP. SEAL.] STINEMAN COAL MINING CO.,
LEON WALKER, *Secretary.*

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Leon Walker, being duly sworn according to law, deposes and says that he is the Secretary of the Stineman Coal Mining
38 Company; that the matters of fact set out in the above answer are true, and the matters of law therein stated he is advised are true.

LEON WALKER.

Subscribed and sworn before me this 14th day of June, 1911.
LEWIS H. VAN DUSEN,
Notary Public.

Commission expires March 2, 1915.

Filed June 16, 1911. Roll B. Thompson, Prothonotary.

39 C. P., Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur Motion and Rule to Dismiss Action.

Opinion.

The action in trespass docketed to the above stated number and term was begun March 26, 1908, and plaintiff's Statement filed November 21st, of that year. On December 18, 1908, plaintiff served rule on defendant to plead within thirty days, and no plea being entered, on March 10, 1909, the Prothonotary entered plea of not guilty, as per Rule of Court. At September and December Terms, of 1910, the case was on the trial list and continued. On April 3, 1911, leave was granted by the Court, on motion, to amend the præcipe and writ enlarging claim, and on April 13, 1911, an amended statement was filed, to which the defendant, on April 17th, filed exceptions and also a plea of the statute of limitations as to that portion of the claim in excess of the original statement. The case was again on the trial list for May Term, continued first until July 10th and later continued generally. On June 5, 1911, defendant presented petition to dismiss, upon which the pending rule was granted.

40 Said petition alleges, inter alia, in paragraphs second and third as follows:

"2. During the period of the present action and prior thereto it was engaged, inter alia, in transporting in interstate commerce coal mined by a large number of mine owners and operators located along its lines within the State of Pennsylvania, among whom was the plaintiff in the present action, and that in conjunction with

such transportation it was also engaged in the transportation of coal exclusively within the State of Pennsylvania for such owners and operators. That for the purpose of enabling shipments to be made both to points beyond and within the State of Pennsylvania it owned, maintained and operated a large number of coal cars which were used by it for both intrastate and interstate shipments, no segregation or apportionment of these cars being made as between the two classes of shipments."

"3. During the period of action and prior thereto it had in force certain regulations providing for the distribution of its coal cars among shippers desirous of using the same, and in making this distribution it in no wise undertook to limit the use of the cars so delivered to any shipper to either intrastate or interstate shipments, but accepted and transported the cars when loaded to the destinations designated or prescribed by the shippers loading them without regard to the consideration whether those destinations were points beyond or within the State of Pennsylvania."

Paragraphs one, four and five, allege the existence of the defendant corporation as one organized under the laws of the State of Pennsylvania, operating in said State and other States, subject to the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to regulate commerce." That by the provisions of said Act and its supplements, prohibiting unlawful and unjust discrimination in the distribution of equipment by
41 railroad companies, said defendant company is subject to control by the Federal Courts exclusively, and that owing to said exclusive Federal control this Court is without jurisdiction in the cause of action sued on.

This proceeding is somewhat new to Pennsylvania practice. If treated from a technical standpoint, the Rule could readily be discharged for several reasons. Both as a plea in abatement and as a demurrer it comes too late, as will be seen by the above recital of the record. Under our Rule of Court a plea in bar has been entered and under all the authorities after such entry a plea in abatement is too late. Good Intent Stage Co. vs. Hartsell, 122 Pa. St. 277. Daley vs. Iselin, 212 Pa. St. 279. The plea to the general issue was regularly entered by the Prothonotary under our Rules of Court after a Rule served on the defendant to plead. It is, therefore, a regular plea in bar.

Technically also it cannot stand as a demurrer, because a demurrer admits all the facts of the declaration. A demurrer cannot raise collateral matter and set up other or new facts on which it relies to oust the action. As a demurrer this petition would be what is called a speaking demurrer, in that it sets up facts outside of the matters set forth in the declaration as a ground for defeating the action. Moreover as a demurrer it comes too late because presented after a plea to the general issue has been filed. Allwein vs. Brown, 29 Superior Court 331. Therefore, either as a plea in abatement or as a demurrer, or treated as a combination of both, the Rule in this case should be discharged as coming too late.

The question raised in the petition, however, is in effect a plea to the jurisdiction. It alleges exclusive jurisdiction of the subject matter of the suit in the Federal Courts or before the Interstate Commerce Commission under the Federal Act regulating that subject. Objection to the judicial power of a court of course may be taken advantage of at any stage of the case, even on appeal.

Want of jurisdiction of the subject matter is an inherent and
42 incurable defect which cannot be waived by any asquiescence of the parties and can be raised at any stage of the proceedings in which such want of jurisdiction properly appears either in the pleadings or in the evidence offered in course of trial. As a plea, however, it is said to have no place in our jurisdiction. Troubat and Haly's Practice, Vol. 1, 5th Edition, page 282, Section 513. Is then the question of jurisdiction raised by this petition and the rule granted thereon properly before the Court at this time? We prefer to treat it in this way rather than technically as a plea in abatement or as a demurrer. In our view, while as a plea in abatement or as a demurrer it comes too late, as a plea to the jurisdiction it comes too early. In effect it assumes facts which are not now before the Court. Paragraphs two and three of the petition allege a certain state of facts which do not appear in any of the pleadings and would be the subject of proof. These facts are substantive as a defense in behalf of the defendant and as such must be proved as facts. The question raised, therefore, by this petition is one which can doubtless be interjected as a defense either at the close of the plaintiff's case, if the facts therein are brought out on cross-examination, or at the close of the defendant's case as a matter of distinct proof of such defense. If, as a question of law, the Interstate Commerce Act of Congress, approved February 4, 1887, entitled "An Act to regulate commerce," confers sole and exclusive jurisdiction on the Federal Courts and upon the Interstate Commerce Commission as to acts of discrimination in the distribution of railroad equipment to shippers, that is a legal proposition which can only be passed on by the Court when it is shown that the defendant railroad is engaged "inter alia, in transporting interstate commerce coal" as well as in transporting coal wholly within the state for the plaintiff or other owners and operators, as alleged in paragraph two of the petition. Paragraph three of the petition also alleges the existence of certain regulations "for the distribution of its coal cars among shippers desirous of
43 using the same" and that such distribution was without regard to whether such shipper wanted it for intrastate or interstate shipments. Such allegations are clearly matters of fact subject to proof and cannot be taken for granted on mere petition and answer. The question of jurisdiction, therefore, raised by this proceeding is prematurely raised.

The plaintiff's statement does not allege or aver anything with respect to interstate commerce or that any of its coal trade is without the State. It does not claim and cannot of course claim under the authority of cases already tried in this Court and approved by the Appellate Courts for any coal shipped by the plaintiff to points

without the State. As a plea or proceeding, whatever it may be named, for raising the question of jurisdiction we regard it as premature and the Rule should be discharged for that reason alone.

We prefer not to enter at length upon the merits of the controversy as to jurisdiction at this time. The right of a plaintiff to recover under the Pennsylvania discriminatory acts has been clearly recognized by the Appellate Courts of Pennsylvania. In Wright vs. Baltimore & Ohio R. R. Co., 32 Superior Court 5, as appears in the charge of President Judge Kooser, the question of jurisdiction and of the right of a plaintiff to recover for shipments wholly within the State of Pennsylvania was squarely raised and the judgment of the lower Court affirmed by the Appellate Court. In a case from this County, Hillsdale Coal & Coke Company vs. Pennsylvania Railroad Company, 229 Pa. St. 61, one of the principal defenses, at least indirectly, raised the question of jurisdiction. The position taken by the trial Judge, permitting a recovery for a percentage of the business of the plaintiff company shown to have been within the State of Pennsylvania, was affirmed by the Supreme Court and the language of Mr. Justice Potter, on page 67, would indicate that the question of jurisdiction was clearly in mind in affirming the
44 position taken by the lower Court. The language there used, when he says, "the Interstate Commerce Commission would have no jurisdiction over a claim for damages sustained in connection with commerce wholly within the state, and therefore the suit pending before that body could not affect the plaintiff's right to recover for the damages here claimed," would clearly indicate the mind of our highest Appellate Court that there is a dual right to recover for the two classes of business, namely, intrastate and interstate. The Pennsylvania Constitution, as well as certain statutes based thereon, have provided for the punishment of certain undue and unreasonable discriminatory acts, either by civil or penal action. These acts of our own State would be wholly useless and nugatory if the position taken by the learned counsel for defendant were correct. No railroad company in Pennsylvania, however short its line or meager its equipment, could fail to show that some of the car equipment which it operates at some stage of its life had been used in interstate business. This simple fact alone, if the position of defendant's counsel is sustained, would defeat the right of a plaintiff to use the State Courts for a recovery against any railroad company within the State for an undue and unreasonable distribution of cars. Carried out to its logical conclusion, therefore, the argument of counsel proves too much.

Without laboring the merits of the question, however, further at this time, we are of opinion that the rule should be discharged as prematurely raising the question of jurisdiction.

Decree.

Now, July 19, 1911, Rule discharged at the cost of the defendant. Exception noted and bill sealed.

By the Court. ALLISON O. SMITH, *P. J.*

Filed Jul- 20, 1911. Roll B. Thompson, Prothonotary.

45 C. P., Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Testimony.

GEORGE W. CLARK called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. COLE:

Q. Where do you live?
A. Altoona, Pennsylvania.
Q. How long have you lived there?
A. 18 years.
Q. In 1902, '3 and '4 what position did you hold with the Pennsylvania Railroad?
A. Car distributor at Altoona.
Q. What were your duties, just in a general way now?
A. Distribution of cars to the various regions.
Q. And to the various mines?
A. No sir.
Q. Various operations?
A. No sir, to the regions.
Q. Just to the regions?
A. Yes sir.

46 Q. Were you familiar with the rules that were enforced by the Railroad Company in distributing cars at that time?
A. I was familiar at that time, I don't know that I am familiar now.

Q. During the years 1902, '3 and '4 what was the rule with reference to charging the mine with individual cars in determining the number of cars that should go to that mine?

A. My recollection is they were not charged against the mine. I don't know that positively, the sheets would have to show that. It is so far back I can't say that positively.

Q. That is the way your understanding of the rule is, they were not chargeable against the mine?

A. At that period, yes sir.

Q. That is, if a mine was rated at 25 cars and it had 25 individual cars, it would still be entitled to its pro rata share out of the general Pennsylvania cars for distribution?

A. That is during the period that the individual cars did not count, provided the capacity of the mine siding would enable them to place their percentage of the railroad cars available that day.

Q. Now that was the general rule that was carried out, supposed to be carried out, was it, among the operators?

A. It was carried out so far as I know at that time, yes.

* * * * * * *

47 *Stipulation.*

It is admitted by the parties, that although substantially all of the plaintiff's coal on account of which recovery is sought, would have been sold f. o. b. the mines, that some of it would have been consigned by the plaintiff at the mine to the ultimate consumer at points outside the State of Pennsylvania.

48 *Defense.*

M. TRUMP called on part of defendant, being duly sworn and examined, testified as follows:

By Mr. GOWEN:

Q. What position did you hold with the Pennsylvania Railroad Company in the years 1902, '3 and '4?
A. General Superintendent of Transportation.
Q. You were familiar with the location of the Company's lines?
A. Yes sir.
Q. Were they confined at that time to the State of Pennsylvania or did they extend beyond the State?
A. Beyond the State.
Q. And was it engaged at that time in the transportation of freight and passengers both within the State and to points in different States?
A. It was.
Q. In other words, it was engaged in Interstate commerce?
A. Yes sir.
Q. Were you also familiar with the method of distributing cars by the defendant, during those years, to shippers?
A. Yes sir.
Q. Was there but one distribution made, leaving the question of the use of the car as between shipments to points within the State and shipments to points without the State at the option of the shipper?
A. Yes sir.
Q. The Company distributed its cars without any restriction then as to the use to which they should be put?
A. Yes sir.
Q. As between intra and interstate shipments?
A. We didn't know where they were going to when distributed.
Q. And you didn't prescribed what use the shipper should make of them?
A. No sir.
Q. Now as a matter of fact was it not a large volume of coal which was shipped by the various shippers to whom the cars were delivered shipped to points without the State?
A. Yes sir.
Q. In the three years which I have mentioned?
A. Yes sir.

49 Cross-examination.

By Mr. COLE:

Q. You did not require the shippers to designate when they ordered cars where the destination should be, did you, as a general thing?

A. No sir.

Q. Did the distribution of cars to the South Fork and the Mountain Divisions take place from Altoona, in the State of Pennsylvania?

A. Well Altoona and Harrisburg combined, yes sir.

50 Mr. GOWEN: If the Court please, we offer in evidence duly certified of seven decisions and orders of the Interstate Commerce Commission, which deal with and prescribe the method of distribution to be followed by carriers of coal cars where a percentage distribution is required. (Papers marked Defendant's Exhibits "A" to "G" inclusive.)

Mr. COLE: They are objected to as not being material to the facts in this case. I suppose they had better go into the record, but we raise this objection in order that we may not appear to admit their materiality.

The COURT: Objection overruled evidence admitted, exception noted for plaintiff and bill sealed.

51 (*Copy of Defendant's Exhibit "A."*)

"Interstate Commerce Commission,
Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached is a true copy of the supplemental report and orders of the Commission in the cases of Hillsdale Coal & Coke Company v. Pennsylvania Railroad Company, No. 1063; W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company v. Pennsylvania Railroad Company, No. 1139; Clark Brothers Coal Mining Company v. Pennsylvania Railroad Company, No. 1111; James H. Minds and Julia A. Matz, trading as The Bulah Coal Company v. Pennsylvania Railroad Company, No. 1136, and James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company v. Pennsylvania Railroad Company, No. 1137, the original of which is now on file and of record in the office of said Commission.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Commission this 4th day of November, 1912.

[Seal of Interstate Commerce Commission.]

JOHN H. MARBLE,
Secretary.

Opinion No. 1833.

"Interstate Commerce Commission.

No. 1063.

HILLSDALE COAL & COKE COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY & COMPANY,
v.
SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY
v.
SAME.

52 No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL COMPANY,
v.
SAME.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. Minds and William J. Matz, Lately Trading as The Bulah Coal Company,
v.
SAME.

No. 1063.

HILLSDALE COAL & COKE COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY & COMPANY,
v.
SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY
v.
SAME.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL COMPANY,
v.
SAME.

53 No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. Minds and William J. Matz, Lately Trading as The Bulah Coal Company,
v.
SAME.

Submitted April 20, 1911. Decided March 11, 1912.

Reparation awarded for damages resulting from discriminations practiced by the defendant in the distribution of coal cars.

David L. Krebs, Harry White and A. M. Liveright for Hillsdale Coal & Coke Company and Clark Brothers Coal Mining Company.
William A. Glasgow, Jr. and John H. Hall for W. F. Jacoby & Company.
H. W. Moore, George M. Roads, John H. Minds, William H. Patterson and James H. Gleason for Bulah Coal Company.
George V. Massey, Francis I. Gowen and Murray & O'Laughlin for defendant.

Supplemental Report of the Commission.

HARLAN, *Commissioner:*

In Joynes v. P. R. R. Co., 18 I. C. C., 361, it was alleged that the defendant had given a preferred use of its terminal facilities in Pittsburgh to certain shippers of fruits and vegetables, in consequence of which the complainant had sustained loss by reason of the decay of certain of his shipments due to the delay in setting his cars at the unloading platform. We declined to make an award, three Commissioners dissenting, on the ground that this Com-ission was not authorized under the act to award damages of that character. The general principle announced was that money
54 damages of that nature, arising out of discrimination ascertained and found by the Commission to have been practiced by an interstate carrier, are cognizable only in the courts and that our jurisdiction extends to what is there referred to as rate damages as distinguished from general damages of the kind demanded.

These complaints, in which the same defendant was charged with discrimination in the distribution of its coal-car equipment and in which general damages are alleged to have been sustained by the petitioners by reason of its unlawful practices in that regard, were then pending before the Commission. While they were still under consideration and after our conclusions in Joynes v. P. R. R. Co., supra, had been announced, the circuit court of the United States for the eastern district of Pennsylvania, in Morrisdale Coal Co. v. P. R. R. Co., 176 Fed., 748, dismissed an action for damages alleged to have been sustained by reason of the same rules and regulations of the Pennsylvania Railroad respecting the distribution of its coal cars as are involved in the cases now before us. The claim was based on discrimination, and the authority of the court had been invoked not only to determine that discrimination had been practiced by the defendant against the plaintiff but also to ascertain and enter judgment for the damages so sustained. The court held that this Commission alone could entertain a complaint of that nature. See also Morrisdale Coal Co. v. P. R. R. Co., 183 Fed., 929.

It will be seen therefore that with respect to the principle announced in Joynes v. P. R. R. Co., supra, there is a conflict of view as between the Commission and the very court to which these complaints, if refused any relief here, would doubtless have to resort to secure a judgment for the damages here claimed to have been sustained. In order, therefore, to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases, we concluded to proceed with these
55 claims; and having found that undue discriminations had been practiced by the defendant against the complainants, we ordered a reargument on the question of the amount of damages respectively sustained by them by reason thereof.

The history of the complaints, the issues raised by the pleadings, and our course in dealing with them, are fully explained in our previous reports herein. Hillsdale Coal & Coke Co. v. P. R. R. Co., 19 I. C. C., 356; Jacoby & Co. v. P. R. R. Co., 19 I. C. C., 392; and Bulah Coal Company v. P. R. R. Co., 20 I. C. C., 52. And therefore, in proceeding for the reasons explained to exercise jurisdiction to award damages, no statement of the facts need to be made. It will suffice to refer to our reports in the cases cited. The record has now been carefully studied with a view to arriving at the amount of damages which each of the complainants is shown to have sustained, and we shall briefly announce our conclusions:

Claim of the Hillsdale Company.

We find that as a result of the discriminatory acts of the defendant the Hillsdale Coal & Coke Company was damaged in the sum of $27,193.01, which it is entitled to recover, with interest from May 9, 1907.

The original claim was for $127,855.65, which upon reargument was restated at $108,207.05, based on the assumption of a full car supply. A more conservative claim of $65,434.87 was also made in the brief on reargument, based on an assumed output of 600 tons per day and what is claimed would have been a fair distribution of cars to this division of the defendant's lines and a fair share of these mines. Giving full weight to all that we find of record, however, we have been unable to find any clear basis for awarding this sum. Nor is there sufficient proof to enable us in this claim to make any finding with respect to the damages alleged to have been sustained by reason of the excess cost of mining the coal actually shipped to interstate destinations resulting from the irregular
56 and inefficient working of the mine due to the failure of the defendant to furnish a regular and adequate supply of cars.

In arriving at our conclusion we have divided the time into two periods, the first from October 1, 1903, to March 31, 1906, after which the mines in this district were closed down for several months as the result of a strike and the second from August 1, 1906, to May 1, 1907. We find the following facts established by the complainant's proof, and have used them as factors in calculating the damages:

(*a*) That the complainant's mines, known as Hillsdale Nos. 2 and 3, during each of the two periods could have produced and disposed of an average of 500 tons of coal per working day; and that 22 working days would have been an average working month.

(*b*) That if the complainant had received its proper proportion of the cars available for distribution by the defendant it could have shipped and disposed of 143,880 tons during the first period and 67,795.20 during the second period; that it actually shipped during the two periods 45,059.84 tons and 35,719.25 tons, respectively, making a shortage in its output of 98,820.16 tons during the first period and 32,075.95 during the latter period; that of this tonnage 87,831.36 tons would have moved to points without the state of Pennsylvania during the earlier period and 15,662.68 during the latter period. In other words, we find that the quantity of coal which the complainant was prevented from selling and shipping to interstate destinations as the result of the discrimination against it in the matter of car supply was 87,831.36 tons and 15,662.68 tons for the periods named.

(*c*) That the average selling price for the coal at the mine for interstate markets would have been $1.0711 per ton during the first period and $1.1320 during the second period; that the cost of production during the same periods with its proper proportion of cars would have been 81 cents and 86 cents per ton, respectively,
57 and that the profit lost on the shipments and sales which the complainant was prevented by the discriminatory acts in question from making during the first period was 26.11 cents per ton and during the second period 27.2 cents.

We have attached no importance to the fact, but for a better understanding of the situation it may be well to state, that this complainant has recovered of the defendant a judgment in the sum

of $17,500 in an action in the state courts similar to this proceeding, but relating only to intrastate traffic. Hillsdale Coal & Coke Co. v. P. R. R. C., 229 Pa., 61; 78 Atl., 28.

Claim of Jacoby & Company.

We find that by reason of the discriminations ascertained and set forth in our report in Jacoby v. P. R. R. Co., 19 I. C. C., 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record from which we find:

(*a*) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

(*b*) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days, and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days.

(*c*) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

(*d*) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

58

(*e*) The actual cost of production is shown by the record as $1.106 per ton during the first period and $1.049 per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.

We further find that the complainants in the sale of their mine realized a profit of $7,500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded.

Claim of Clark Brothers Company.

The discrimination practiced by the defendant against Clark Brothers Coal Mining Company is set forth in Jacoby v. P. R. R. Co., 19 I. C. C., 392. We now find that the damages sustained by this claimant as the result thereof amounted to $31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907.

The amount of its claim, as stated in the original petition was $36,401.12. Our findings of fact, on which we arrive at this conclusion, are as follows:

59 (*a*) That the mines known as Falcon Nos. 2, 3 and 4 had an average output capacity of 600 tons, 120 tons, and 275 tons per working day, respectively, for the period of the action; and that 20 working days would have been an average working month.

(*b*) That dividing the time in question into two periods, one prior to March 31, 1906, and the other from August 1, 1906, to May 1, 1907, as we have done in the Hillsdale case, supra, the complainant should have disposed of and shipped 38,537.40 tons from Falcon No. 2 during the first period and 74,498.40 tons during the second period; that it actually shipped from that mine 11,812.76 tons and 21,326.18 tons in the respective periods, making a shortage in the output of 26,724.64 tons during the first period and 53,172.22 tons during the second period; and that of this tonnage it would have shipped and sold at interstate destinations 19,086.73 tons during the first period, and 35,109.61 tons during the second period.

(*c*) That from Falcon No. 3 the complainant could have shipped and sold 7,707.48 tons during the first period and 14,899.68 during the second period, if it had received its proper share of equipment; that it actually shipped from this mine during those periods 1,184.66 tons and 3,018.90 tons, respectively, making its output 6,522.82 tons during the first period and 11,880.78 during the second period less than it would have been with the proper car supply; and that of the figures last mentioned it would have shipped to points without the state of Pennsylvania 3,866.72 tons and 6,423.93 tons in the respective periods.

(*d*) That with its proper proportion of cars the mine known as Falcon No. 4 could have produced, sold, and shipped during the first period 12,210 tons and during the second period 34,145.10 tons, whereas it actually was able to ship but 2,306.12 tons and 11,105.45 tons; that it therefore shipped 9,903.88 tons during the first period and during the second period 23,039.65 tons less than it would have sold and shipped with its proper proportion

60 of the cars; and that of this shortage 9,184.85 tons represents what would have been interstate business during the first period, and 8,497.02 tons during the second period.

(*e*) That the average selling price of the coal mined at Falcon No. 2 during the first period was $1.289 per ton and during the second period $1.25 per ton; that the cost of production at that mine, based on a fair car supply, would have been 92 cents per ton and

96 cents per ton during the respective periods; that the average selling price of the coal from Falcon No. 3 was $1.20 during both periods and the cost of production 92 cents and 96 cents during the two periods; that the average selling price of Falcon No. 4 was $1.07 per ton during the first period and $1.132 per ton during the second period, and that the cost of production at that mine was 82 cents per ton and 86 cents per ton during the respective periods. The profit that would have accrued on the output of the respective mines was therefore as follows: Falcon No. 2, 36.9 cents and 29 cents; Falcon No. 3, 28 cents and 24 cents; Falcon No. 4, 25 cents and 27.2 cents per ton. This measures the loss on the tonnage which the complainants were unable to ship.

(*f*) That the actual cost of production is shown by the record as $1.1419 per ton during the first period and $1.2063 per ton during the second period at Falcon No. 2; that the actual cost at Falcon No. 3 was $1.166 per ton during the first period and $1.311 per ton during the second period; that the actual cost at Falcon No. 4 was $1.017 and 90 cents during the respective periods; and that the excess over the cost of production, as shown in the preceding paragraph herein, resulting from the irregular car supply, was 22.19 and 24.63 cents per ton, respectively, at Falcon No. 2; 24.6 and 35.1 at Falcon No. 3; and 19.7 and 4 cents for the respective periods at Falcon No. 4. This is the measure we have used in arriving at the loss sustained by these complainants in increased cost of
61 producing the coal actually sold and shipped to interstate points during the period in question.

Claim of Bulah Coal Company.

Following our conclusion in Bulah Coal Co. v. P. R. R. Co., 20 I. C. C., 52, that the defendant had unlawfully discriminated against these complainants, we now assess the damages resulting therefrom at $50,307.05, with interest from June 28, 1907.

The reparation prayed for by the complainants aggregates $155,401.59. In our previous report we took April 12, 1904, as the date for dividing the period of the action. Upon further reflection October 1, 1904, seems more proper, that being the date of the formation of the new copartnership. In arriving at the foregoing amount of reparation we have therefore considered the matter in two periods, one prior and the other subsequent to that date, and make the following findings:

(*a*) That the fair rating of the mine, fixed by the defendant without objection by the complainants, was 560 tons during both of the periods referred to.

(*b*) That 22 working days would in this case have been an average working month, although it is alleged that the mine could have been worked 26 days per month.

(*c*) That if the complainants had received their proper proportion of the cars available for distribution they could have mined, sold, and shipped 120,415.68 tons during the first period and 214,-

257.12 tons during the second period; that they actually shipped during the two periods 110,892 and 143,000 tons, respectively, making a shortage in their output of 9,523.68 tons in the first period and 71,257.12 tons for the second period; and that of this tonnage 3,878.04 tons during the first period and 48,540.34 tons during the second period would have moved to and have been sold at interstate destinations.

62 (*d*) That the average profit on orders received by the complainants for points without the state of Pennsylvania, and which were canceled and unfilled as the result of lack of their fair proportion of available equipment, would have been 71.8 cents per ton during the first period and 25.2 cents per ton during the latter period. This measures the complainants' loss on the coal which they were unable to ship during the period of the action, and the damages allowed on this ground aggregates $15,016.60.

(*e*) That the cost of production at the complainants' mine during the first period was $1.23 per ton on the average, and during the second period $1.08; that the cost of production would have been 88 cents per ton during both periods if a nondiscriminatory share of the car supply had been received; and that the excess in the actual cost of production of the coal mined and shipped to interstate destinations resulting from the discrimination in car supply was therefore 35 cents per ton during the first period and 20 cents during the second period. This is the measure of the complainants' damages in the excess cost of production on the coal actually sold and shipped to points outside the state of Pennsylvania during the period of the action; and the damages awarded on that ground aggregates $35,290.45.

In cases of this kind there is a natural tendency on one side to enlarge and on the other to minimize the claim made. This is characteristic of the record before us. Damages are claimed by the petitioners to an extent not supported by the evidence adduced; on the other hand, the defendant has not sought so much to help the Commission to arrive at a correct award as to show the fallacious character of the factors adopted by the complainants in arriving at their estimates of their damages. The result is a record that is not so helpful as it might be. The responsibility for this, however, rests with the parties; in such a case we can accept only the responsibility that follows upon a careful study of the record

63 and an earnest effort to weigh all the evidence before us and to reach such conclusions as it fairly justifies.

Many theories as to the elements that should be considered in estimating damages in a case of this kind were advanced by each side. It is said by the complainants that their damages should be estimate on the basis of a supply of coal cars according to the physical capacity of their mines, or at least on the basis of their rated capacity. We have dealt with the claims only on the basis of the fair proportion of the available equipment that each claimant was entitled to receive in view of what we here find would have been a proper rating for each operation. According to the argument and brief on behalf of the defendant there is no sound theory upon which

the damages of the complainants may be calculated. The defendant contends in all these cases that the coal which the complainants were unable to mine because of their failure to obtain their fair share of cars still remained in the ground, and that the extent of the damage really suffered can not therefore be ascertained without proof, showing that the coal when subsequently mined was sold at a less profit than might have been realized during the period of the action. We are not prepared to enter upon a discussion of that question. Such claims are clearly justifiable, and we know of no better guide or basis for our action than the rule followed by the courts in similar cases. In the action by the Hillsdale Coal & Coke Company in the state courts, to which reference has heretofore been made, the supreme court of Pennsylvania, in 229 Pa., 261; 78 Atl., 28, said:

As we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination, in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from that mine. * * * Counsel for appellant argued that
64 because as a result of the defendant's discrimination, the coal of the plaintiff was left in the ground and might be available for future shipment, and as there was no evidence that prices which prevailed throughout the period of the action were abnormal, or in excess of those reasonably ruling, there was no room for the inference that the plaintiff would realize for *his* coal when it might be shipped in the future less than it would have realized if shipped during the period of the action. But the burden was upon the defendant to show anything of this kind, by way of mitigation of damages, if it could do so, and it offered no evidence for any such purpose.

We do not undertake to say whether this is a correct rule, but simply refer to the case in explanation of our findings.

Orders will be entered in accordance with these conclusions.

Supplemental Orders.

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 11th Day of March, A. D. 1913.

No. 1063.

HILLSDALE COAL & COKE COMPANY
v.
THE PENNSYLVANIA RAILROAD COMPANY

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a

supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 356, and all the findings and conclusions
65 in said reports are hereby referred to and made a part hereof:

It is ordered, That the above named defendant be, and it is hereby, authorized and directed to pay unto complainant, Hillsdale Coal & Coke Company, on or before the 1st day of June, 1912, the sum of $27,193.01, with interest thereon at the rate of 6 per cent per annum from May 9, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. Jacoby & Company,
v.
THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above named defendant be, and it is hereby, authoried and directed to pay unto complainant-, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent per annum from June 28, 1907, as reparation for defendant's discrimination in distribution
66 of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY
v.
THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above named Defendant be, and it is hereby, authorized and directed to pay unto complainant, Clark Brothers Coal Mining Company, on or before the 1st day of June, 1912, the sum of $31,127.96, with interest thereon at the rate of 6 per cent per annum from June 25, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

67 No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as The Bulah Coal Company
v.
THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof;

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $31,715.57, with interest thereon at the rate of 6 per cent per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of James H. Minds and William J. Matz, Lately Trading as The Bulah Coal Company,
v.
THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and
68 full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof;

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto, complainant, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $18,591.48, with interest thereon at the rate of 6 per cent per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

By the Commission.

[SEAL.] JOHN H. MARBLE, *Secretary.*"

69 C. P., Clearfield County, May Term 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

DEFENDANT'S EXHIBIT "C."

Orders.

At a General Sessions of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 7th Day of March, A. D. 1910.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY & COMPANY,
v.
THE PENNSYLVANIA RAILROAD COMPANY.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY
v.
SAME.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made

a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of
70 foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required, on or before the first day of Nov. 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

71 (*Copy of Defendant's Exhibit "D."*)

"Interstate Commerce Commission
Washington.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached is a true copy of the report and order of the Commission in the case of Hillsdale Coal & Coke Company v. Pennsylvania Railroad Company, No. 1063, the original of which is now on file and of record in the office of said Commission.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the Commission this 4th day of November, 1912.

[Seal of Interstate Commerce Commission.]

JOHN H. MARBLE, *Secretary.*

Opinion No. 1383.

Before the Interstate Commerce Commission.

No. 1063.

HILLSDALE COAL & COKE COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY.

Decided March 7, 1910

Report and Order of the Commission.

No. 1063.

HILLSDALE COAL & COKE COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY.

Submitted January 25, 1909. Decided March 7, 1910.

1. To the physical capacity of a coal mine the defendant adds its commercial capacity tested by the shipments made from it during the preceding 12 months, and divides the sum by
72 two; these two factors being revised quarterly the mine is thus given a constantly corrected rating in the distribution of coal cars during percentage periods. If this basis is equitably applied to all mines served by the defendant the Commission is unable to see that it results in an unequal, unfair, or discriminatory distribution of its equipment.

2. The complainant's contention that physical capacity alone is the fair and sound basis for rating coal mines for car distribution is not sustained; the utmost obligation of a carrier under the law is to equip itself with sufficient cars to meet the requirements of a mine for actual shipment; and it is of no real concern to the carrier what are the physical possibilities of a mine in the way of daily output except as that factor may afford some measure of what its actual shipments will be.

3. The Commission reaffirms its previous ruling to the effect that the owner of private cars is entitled to their exclusive use and that foreign railway fuel cars assigned to a particular mine can not be delivered to another mine; but it again holds that all such cars must be counted against the distributive share of the mine receiving them. It is therefore, Held, that the defendant's rule, providing that the capacity in tons of such "assigned" cars shall be deducted from the rated capacity of the mine receiving them and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" cars, is unlawful and discriminatory.

4. The defendant's contention that, so long as the petitioner

receives all the coal cars it is entitled to, it has no right to complain because some other operator receives an undue proportion of cars is not sustained. The law not only gives the shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier but the assurance also that no other shipper shall fare ratably better at the hands of the carrier.

73 5. The question of damages, which the complainant claims to have suffered as the result of the discriminations herein found to have been practiced against it, reserved for further argument.

David L. Krebs and Harry White for complainant.

Francis I. Gowen, George V. Massey, and Murray & O'Laughlin for Pennsylvania Railroad Company.

Report of the Commission.

HARLAN, *Commissioner:*

In this group of cases, of which the above-entitled complaint has been selected as the one in which the views of the Commission may best be expressed, the petitioners bring to our attention the method or rules in effect on the lines of the defendant, during the period mentioned in the complaints, for the distribution of coal cars among the coal mines which the defendant serves. In each case the petitioner demands an order by the Commission requiring the defendant so to change or modify its rules that the distribution of its coal-car equipment may be made on what they regard as a more equitable and just basis. Damages in large amounts are also asked in order that the several complainants may be compensated for losses which they claim to have suffered by reason of the alleged failure of the defendant during the period of the action to give them the number of cars that they were justly entitled to receive.

The consideration of these complaints has been deferred because when they were submitted for decision, there were pending in the lower courts and before the Supreme Court of the United States cases involving not only the question of the soundness and legality of the rulings heretofore made by the Commission respecting the distribution of coal cars by interstate carriers, but involving also the power and authority of the Commission to control and enter orders in respect to the practices of interstate carriers in such mat-

74 ters. Under the circumstances it seemed wise to await the final disposition of those cases in the court of last resort before making any further announcement of our views with respect to the matter of coal-car distribution; and this course seemed particularly desirable in view of the fact that the defendant in this proceeding, although not a party to any of the appeals in the Supreme Court of the United States, had been permitted, upon its special request and because of its interest in the questions involved, to participate in the argument and presentation of the cases before that court.

The general status of the question before the Commission may

be readily ascertained by an examination of our decisions in one or two formal proceedings since the passage of the so-called Hepburn Act. In Railroad Commission of Ohio v. H. V. Ry. Co., 12 I. C. C. Rep., 398, we held that while a carrier during periods of car shortage might not assign privately owned cars to operators other than their owners, and might not assign foreign railway fuel cars to any mines except those to which they had been manifested by the foreign lines, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belonged or to which the foreign railway fuel cars had been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine were not sufficient to fill out its distributive share of available coal cars, it should have in addition only so many of the system cars of the carrier as might be necessary, when added to the private or foreign railway fuel cars so received by it, to make up its full ratable proportion of the total available coal cars of all classes. We also held that all foreign railway fuel cars consigned to a particular operator, and all private cars owned by a particular operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars.

75 The order then entered to give effect to these conclusions was accepted by the defendant in that proceeding. But when the same general principle was applied by the Commission in Traer v. C. & A. R. R. Co., 13 I. C. C. Rep., 451, to the distribution of company fuel cars the defendant in the latter proceeding declined to accept our order either as one within the power of the Commission to enter or as a just and proper disposition of the contention made upon the record. In the same report we disposed of similar complaints by the same petitioner against the Illinois Central Railroad Company and the Chicago, Peoria & St. Louis Railway Company. These companies also declined to obey our order. The result was proceedings in the United States circuit court for the northern district of Illinois, the Illinois Central and the Chicago & Alton being the moving parties, in which that court held that the complainant carriers were not entitled to relief from that part of the orders of the Commission that required private and foreign railway fuel cars to be taken into account against the distributive share of the coal companies receiving them, but were entitled to an injunction restraining the enforcement of the orders of the Commission in so far as they related to the cars employed by the complaining carriers in hauling their own fuel coal. From this decree an appeal to the Supreme Court of the United States was presented by the Commission and the whole question was considered by that tribunal in Interstate Commerce Commission v. I. C. R. R. Co., 215 U. S. 452, and Interstate Commerce Commission v. C. & A. R. R. Co., 215 U. S. 479, in which decisions have lately been announced.

The court there held, as the Commission had previously held in Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C. Rep., 86, that the basis adopted by an interstate carrier for the distribution of coal cars among coal operators upon its lines was a regulation or practice "affecting rates" as that phrase is used in section 15 of the

amended act to regulate commerce, and as such was a mat-
76 ter within the regulative power of the Commission. It was also held that the fuel cars of an interstate carrier, in which it hauls fuel for its own use, are instruments of interstate commerce as fully as are its system cars in which commerical coal is hauled for shippers; and consequently "that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equitable distribution and the prevention of an unjust and discriminatory one." Drawing attention to the distribution that must necessarily be observed by the courts between the power to regulate and the unwise exercise of the power in a given case, that court disclaimed for itself, and also denied to any other federal court, the right to usurp the purely administrative functions of the Commission by substituting a regulation that the court might deem wise for one which it considered the Commission in the exercise of its conceded power had inexpediently adopted. The decree of the lower court enjoining the enforcement of the order of the Commission, in so far as it related to the distribution of company fuel cars, was therefore reversed.

It thus appears that the orders of the Commission with respect to the distribution of coal cars by interstate carriers, as expressed in the several cases referred to, remain unaffected by the attacks that have been made upon them in the courts. And our further consideration of these questions in connection with this group of cases has confirmed our conviction that the general principles underlying the disposition made of the previous cases are both sound and just. We shall therefore proceed to ascertain what has been and is now the practice of the defendant in respect to the distribution among coal operators of its available coal-car equipment, and how far it differs, if at all, from what the Commission has regarded and, in the cases referred to, has announced as the just and equitable basis of distribution.

* * * * * * *

77 We come now to the practice of the defendant in the past and at the present time in the distribution of its available coal-car equipment.

Under a rule announced by it on February 1, 1903, the defendant seems to have charged all railroad cars, regardless of ownership, and private cars not owned by the operator loading them, against the distributive share of each mine, but it treated its own fuel cars as a special allotment in addition to the distributive share. On March 28, 1905, a notice was sent to shippers of bituminous coal from mines on the lines of the defendant advising them that thereafter all railroad cars, regardless of ownership, and all private cars not owned by the operator loading them, should be considered as cars available for distribution, except its own company fuel cars and fuel cars sent upon its lines by foreign companies and specially consigned to particular mines.

On January 1, 1906, the defendant divided all cars into two classes which it designated as "assigned" and "unassigned" cars. In the

former class were its own fuel cars, foreign railway fuel cars,
78 and individual or private cars loaded by their owners or assigned by their owners to particular mines. The rule then made effective and still in force provides that the capacity in tons of any "assigned" cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars, and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" or system cars. This order or rule of the defendant was the occasion of some comment in Logan Coal Co. v. P. R. R. Co., 154 Fed. Rep., 497, 498, where the court says:

To illustrate the effect of the order on an individual number of cars as compared with a competitor receiving only company cars, take two operators each having mines rated at 500 tons a day, and assume that on any given day the company has enough of its own cars on hand to deliver to all mines cars which would take care of 70 per cent of the output. Assume that one operator has individual cars available on that day for the shipment of 200 tons, while the other has no individual cars at all. The latter receives railway company cars capable of carrying 70 per cent of 500 tons, or 350 tons. The former, on the day in question, will receive individual cars in which he can ship 200 tons, and his rating for a distribution of the company's cars for that day will be reduced to 300 tons, 70 per cent of which is 210 tons, for the transportation of which he will receive company cars, so that the operator with the individual cars will be able to ship on the day instanced 410 tons, as against the shipment of 350 tons by the operator who has no individual cars. To this extent the relator has the advantage over its competitors who do not own individual cars, and it receives the exclusive use of its cars at all times.

The result arrived at by the court in its illustration seems to us not quite accurate, in that the total car capacity of 700 tons assumed by the court is made up of the company's system cars, and excludes from consideration the fact that one of the mines had on hand individual cars having a capacity of 200 tons, making a total
79 available car capacity of 900 tons. Worked out on the basis of that total car tonnage the owner of the private cars would receive equipment enough to enable him to ship 463 tons and not 410 tons as stated by the court, while the mine depending upon system cars only would be able to ship 437 tons instead of 350 tons as stated by the court. The court used a car capacity of 70 per cent as the total available equipment for the output of both mines instead of a car capacity of 900 tons, or 90 per cent, which was actually on hand in the case assumed. In other words, the court absorbs in its illustration only 760 tons of the output of the two mines, while the facts assumed show that car capacity of 900 tons was available. Under the Commission's rule each mine under these circumstances would have been able to ship 450 tons.

Using the same two mines with an assumed capacity of 500 tons each a day and available equipment with a total capacity of 70 per cent or 700 tons, including the individual cars with a capacity of 200 tons owned by one of the mines, the rule of distribution which

this Commission has approved in Railroad Commission of Ohio v. Hocking Valley Ry. Co. and Traer v. C. & A. R. R. Co., supra, would result in giving the latter mine its individual cars of 200 tons capacity and system cars enough to absorb 150 additional tons, or a total of 350 tons, being one-half of the available equipment tonnage. The mine not owning the individual cars would get the other half of the available equipment tonnage, but all of it in system cars. Under the defendant's rule, on the other hand, the mine owning the individual cars would receive them and would thereby be able to ship 200 tons of its total output capacity of 500 tons a day. The rating of this mine would then be reduced to 300 tons a day as against the rating of 500 tons assigned to the mine owning no private cars, the total reduced rating of the two mines being 800 tons. Instead of 700 tons the equipment remaining available for distribution would carry but 500 tons, of which the mine owning individual cars would get three-eighths, or 188 tons, making its total tonnage 388 tons, while the other mine
80 would get five-eighths, or system cars of a capacity of 312 tons, an advantage of 76 tons enjoyed by the mine owning private cars in the distribution of all available equipment. That mine under the defendant's rule would therefore be able to ship out between 20 and 25 per cent more coal than its competitor, while under the rule approved by the Commission the shipments of the two mines would be the same under the facts assumed by the court in the case cited.

Referring to system fuel cars and foreign railway fuel cars consigned to a particular mine, the court in Logan Coal Co. v. P. R. R. Co., supra, said, p. 503:

The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other. Following are some of the cases in which these questions have been considered: United States ex rel. Coffman v. N. & W. Ry. Co. (C. C.), 109 Fed. Rep., 831; United States ex rel. Kingwood Coal Co. v. W. Va. & N. R. R. Co. et al. (C. C.), 125 Fed. 252; W. Va. & N. R. R. Co. et al. v. United States ex rel. Kingwood Coal Co., 134 Fed., 198, 67 C. C. A. 220; United States ex rel. Greenbrier Coal & Coke Co. v. N. & W. Ry. Co., 143 Fed., 266, 74 C. C. A., 404; State ex rel. v. C., N. O. & T. P. Ry. Co., 47 Ohio St., 130, 23 N. E. 928; United States ex rel. Pitcairn Coal Co. v. B. & O. R. R. Co. et al., 154 Fed. 108.

That is the general theory for the distribution of coal-car equipment that has appealed strongly to this Commission as being fair, reasonable, and nondiscriminatory. We recognize the right of a company to contract with a particular operator for its fuel supply; we recognize the right of a connecting line also to do this; and each may send its cars to those mines to the exclusion of other
81 mines. We also insist that the owner of private cars is entitled to their exclusive use. But in each case we hold that all cars must be counted against the distributive share of the mine re-

ceiving them. When subjected in all its different phases to the scrutiny of the Supreme Court of the United States in the cases just decided and announced (supra) the position of the Commission in this matter was not found objectionable either on legal or constitutional grounds. And as the exhaustive arguments and our further consideration of the same questions in these proceedings have not given us any new light or led us to any different conclusions, the rulings in the previous cases must control the disposition of the complaints in this group of cases so far as they may be pertinent.

Upon all the facts shown of record the Commission therefore finds that throughout the period of the action the system upon which the defendant distributed its available coal-car equipment, including system fuel cars, foreign railway fuel cars, and individual or private cars, has subjected the complainant to an undue and an unlawful discrimination. In this connection an important disclosure is made in a letter of record here, addressed to the president of the Clark Brothers Coal Mining Company under date of March 6, 1907, by the general superintendent of coal transportation of the defendant company. It is there stated that the distribution of coal cars on the lines of the defendant on that date was as follows:

	Per cent.
System cars for company coal	21
Foreign cars for supply coal	6
Individual cars	45
System cars for commercial coal	25
Foreign cars for commercial coal	3
Total	100

This condition of affairs emphasizes the inequity of a system of distribution that first deducts from the rated capacity of a
82 mine the tonnage represented by the capacity of the cars specially assigned to it and then uses the remainder as a new basis for determining the proportion of unassigned cars that the mine is to have. The figures above given show that 72 per cent of all the cars available on the lines of the defendant on the date mentioned were assigned cars, and but 28 per cent were unassigned cars. Manifestly such a basis of distribution can have but one tendency, and that is, not only to steadily increase the physical capacity of the mines that regularly receive this large percentage of assigned cars, but also steadily to increase their commercial capacity, an advantage which the mines having the benefit of no assigned cars obviously can not enjoy. With such a large percentage of assigned cars it can not be doubted that the equipment furnished to some of these mines was sufficient to approximate their ratings, while the small percentage of unassigned cars makes it equally clear that the mines having no other cars must have fallen substantially short of their ratings.

We further find that the continuance of that system of distribution for the future would be unlawful on the same grounds. Although the mine owning private cars or to which company or

foreign railway fuel cars are consigned is entitled to receive them even though in excess of its ratable proportion of all available coal-car equipment, nevertheless the defendant will be required in the future to count all such cars against the distributive share of the mine so receiving them. It is scarcely necessary to add that the complainant's second request for a finding and for an order requiring the defendant, during percentage periods, to distribute ratably among operators, according to the actual output capacity of their mines, "all cars adapted to and used for carrying bituminous coal," whether company fuel cars, foreign railway fuel cars, or private cars, must be denied.

* * * * * * *

83 *Order.*

At a General Session of the Interstate Commerce Commission Held at Its Office in Washington, D. C., on the 7th Day of March, A. D. 1910.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1063.

HILLSDALE COAL & COKE COMPANY
v.
THE PENNSYLVANIA RAILROAD COMPANY.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been
84 had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainant and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required on or before the 1st day of October, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and

to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of the damages claimed by the complainant in this proceeding in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

85 (*Copy of Defendant's Exhibit "E."*

"Interstate Commerce Commission,
Washington.

"I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the paper hereto attached is a true copy of the Report and Order of the Commission entered July 11, 1907, in cases No. 1008, Railroad Commission of Ohio and others against Hocking Valley Railway Company, and No. 1009 Railroad Commission of Ohio and others against Wheeling & Lake Erie Railroad Company, the original of which is now on file and of record in the office of this Commission.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Commission this 7th day of November, 1912.

[Seal of Interstate Commerce Commission.]

JOHN H. MARBLE, *Secretary.*

Before the Interstate Commerce Commission.

No. 1008.

RAILROAD COMMISSION OF OHIO et al.
v.
HOCKING VALLEY RAILROAD COMPANY.

86 No. 1009.

RAILROAD COMMISSION OF OHIO et al.
v.
WHEELING & LAKE ERIE RAILROAD COMPANY.

Submitted June 29, 1907. Decided July 11, 1907.

W. H. Ellis, Attorney General of Ohio, H. B. Arnold, R. J. Mauck and S. W. Bennett for complainants.

J. H. Hoyt, Doyle & Lewis, H. M. McKeehan and W. N. Duncan for defendants.

Report and Order of the Commission

No. 1008.

THE RAILROAD COMMISSION OF OHIO et al.
v.
THE HOCKING VALLEY RAILWAY COMPANY.

No. 1009.

THE RAILROAD COMMISSION OF OHIO et al.
v.
THE WHEELING & LAKE ERIE RAILROAD COMPANY.

Submitted June 29, 1907. Decided July 11, 1907.

Defendants are engaged principally in transportation of coal from mines located upon their lines. Certain other railways purchase their fuel supply from coal operators owning mines
87 upon the lines of defendants and send their own cars upon the lines of defendants, consigned to the coal companies with which railways so sending their cars have contracts for fuel supply. Certain other coal operators have upon the lines of one of the defendants leased, or so called "private" cars, devoted exclusively to the use of such lessees. During a part of the year defendants are unable to furnish all of the cars desired by coal operators along their lines, and at such times the available cars not specially consigned or restricted as to use are divided among the several coal companies according to the capacities of their several mines. But in such distribution the foreign railway fuel cars and the leased or "private" cars are excluded from consideration and are given to the coal companies to which they are consigned or assigned in addition to the full share of cars allotted to such mines in the proportionate distribution. Compaint alleges unjust discrimination against other coal operators along the lines of defendants in that such distribution of cars and such failure to count the foreign railway fuel cars and the leased or "private" cars gives the coal operators to whom such cars are consigned and assigned unwarranted advantages over other operators in the mining and marketing of coal.

Held, That a carrier should give to owner or lessee of private cars the use of such cars; and should also give to a coal company the foreign railway fuel cars consigned to it; but that such private and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered and such company should not be given, in addition to such delivery, a share of the system cars except when the number of "private" and foreign railway fuel cars so delivered to it is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called private cars, in which even- it should be given
88 so many of the system cars as are necessary, when added to the number of private and foreign railway fuel cars assigned

to it, to make up its distributive share of the total available cars, including system cars, foreign railway fuel cars, and so-called private cars.

W. H. Ellis, Attorney General of Ohio, H. B. Arnold, R. J. Mauck and S. W. Bennett for complainants.

J. H. Hoyt, Doyle & Lewis, H. M. McKeehan and W. N. Duncan for defendants.

Report and Order of the Commission.

CLARK, *Commissioner:*

The complaints in both of these cases were brought by the Railroad Commission of Ohio and the individual members of that body. The Attorney General of the State appeared for the complainants. Although a separate record was made in each case, both were heard at the same time and argued together. The decision of the Commission is therefore included in one report.

The basis of both complaints is that the owners and operators of coal mines along the lines of the defendants engaged in shipping coal to other States are unjustly discriminated against in the distribution of cars, although there are two features, one peculiar to each case, as follows:

In the complaint against the Hocking Valley Railway Company, it is alleged that it owns a large percentage of the stock of the Sunday Creek Company, owning and operating mines in Ohio and West Virginia, on the lines of the Hocking Valley and of the Kanawha & Michigan Railway companies, and that while it has not adequate equipment of its own, it has loaned, leased, and furnished cars to the latter company.

89 In the complaint against the Wheeling & Lake Erie Railroad Company, it is stated that certain so-called "private" cars claimed to have been purchased by the Massillon Coal Mining Company and the Wheeling and Lake Erie Coal Mining Company, are not included in or charged against the percentages in distribution of cars to coal mining companies.

Paragraph III of the Complaints is identical in that it alleges that defendants unjustly discriminate against the owners and operators along their lines of railway engaged in shipping coal by not considering "foreign railway fuel cars" in the percentages or distributive number of cars according to ratings established by them based on the capacities of the mines.

"Foreign railway fuel cars" are cars sent onto the lines of the defendants by other railway companies for the purpose of being loaded with fuel coal for the use of such other railway companies. The cars are consigned to certain coal companies with which the railroad companies so sending the cars have contracts for the furnishing of fuel coal in connection with which it is stipulated that the railroad companies will furnish their cars for loading such fuel coal. These cars so consigned are, by the defendant companies,

not taken into account in the distribution of available cars among the several mines and operations along their lines.

The defendants, from time to time, distribute the available cars to be loaded with coal according to certain ratings established and based upon the respective capacities of the mines.

The defendant, the Hocking Valley Railway Company, alleges that prior to the 1st of January, 1906, it did count in the distribution foreign railway fuel cars, but that the foreign railway companies so sending their cars upon defendant's line notified it that if it did not cease its method of counting such cars in the allotment of cars to the various mines, the sending of such foreign railway fuel cars would cease altogether or greatly diminish, and that because of that threat and because of the fact that competing
90 roads were not at that time so counting such cars in distribution it ceased to count them; that on or about August 15, 1906, it learned that a majority of competing railroads in the State of Ohio counted foreign cars against the mines to which they were delivered, and then defendant again began so counting these cars in the allotment to the mines to which consigned and so continued until January 1, 1907, when the practice was again discontinued on renewal of the threat to discontinue or greatly diminish supply of cars so furnished.

In December, 1906, the Ohio Railroad Commission decided that a common carrier in Ohio could not be permitted to suffer freight cars to come upon its line for the use of a shipper located thereon except upon condition that such cars could be used by other shippers similarly situated. It issued an order in effect requiring the carriers to count and distribute in accordance with their ratings all of the available cars upon their lines regardless of ownership or purpose for which sent on those lines. The Sunday Creek Company, which owns a large number of coal mines in the Hocking district, petitioned the United States Circuit Court for the Southern District of Ohio, Eastern Division, for an order restraining the Ohio Railroad Commission from enforcing its order and the carriers from complying therewith. The application for such restraining order was concurred in by the carriers on the ground that the Railroad Commission's order would deprive them of property without due process of law, and was an interference with the movement of interstate commerce. The restraining order was granted and, at the time of hearing these complaints, was still in force.

It is to be noted that in that proceeding the Sunday Creek Company is suing the Hocking Valley Railway Company, which owns nearly all of the stock of the Sunday Creek Company and the Wheeling & Lake Erie Coal Company is suing the Wheeling & Lake Erie Railroad Company, which is the owner of one of the mines leased to and operated by the Wheeling and Lake
91 Erie Coal Company. It can not be held that such a proceeding fairly discloses the interests of the many other producers of coal or that such other producers would be concluded by determination of the interests involved in such intercorporate relations.

Since this case was argued the complications have been relieved by the Railroad Commission of the State of Ohio agreeing to revoke its order and an understanding being reached that thereupon the court would dismiss the cases.

In general, the basis of distribution of the system cars was not complained of as unreasonable or unfair. Evidence was given as to one instance in which a coal company had continued to draw cars in the allotment for one of its mines that had not been worked for about a year and the track to which had been torn up and the tipple of which had gone into decay. It is not understood that any defense of such oversight or discrimination was offered.

The Hocking Valley Railway Company shows that it owns and controls 11,000 coal cars and that for the last ten years it has owned and controlled from 8,000 to 11,000 such cars. During a substantial portion of the year it has a large number of idle cars; for the greater portion of the year it is able to provide all the cars needed, but for four or five months in the year it is unable to meet the maximum demand of shippers of coal. It admits that it furnishes cars for use upon the lines of the Kanawha & Michigan Railway Company, which is a direct connecting carrier and which has a large traffic in coal, coke, lumber, and other commodities; and shows that on account of the inability of the Kanawha & Michigan Railway Company to obtain necessary equipment with which to do its business, the Hocking Valley Railway Company sold to the Kanawha & Michigan 2,500 of its cars, but that, at the same time and before delivering these cars to the Kanawha & Michigan, it purchased and put upon its own lines 3,020 new cars. As before stated favoritism in the sending of the Hocking Valley Railway's cars to the K. & M. road is alleged, on the ground that many mines of the
92 Sunday Creek Company are located on the lines of the K. & M. road and the stock of the Sunday Creek Company is largely owned by the Hocking Valley Railway Company. The testimony does not, however, establish any favoritism toward that company in so sending cars to the K. & M. road. The testimony was that the distribution to the K. & M. was made on the basis of supply and demand, and that if the supply was short on the Hocking Valley the K. & M. was cut proportionately. The K. & M. is in substance and effect a part of the Hocking Valley system. In its annual report to this Commission the K. & M. states it is subsidiary to and controlled by the Hocking Valley system through ownership of capital stock. The question of ownership by the Hocking Valley Railway Company of the Sunday Creek Company is not in issue in this proceeding beyond the question of whether the Hocking Valley Company discriminates in favor of the Sunday Creek Company in the distribution of cars.

The defendant, the Wheeling & Lake Erie Railroad Company, owns 11,400 cars. The basis of its system of distribution of cars among the mines is the tonnage rating of the mine. It states that cars on its line are divided into three classes:

"(*a*) System cars, which includes cars owned by the defendant,

or such as may be on its line of railroad and not owned by some specific shipper or restricted as to use.

(*b*) Foreign railway fuel cars, which include cars of foreign railroads specifically consigned to certain operators to be loaded by the operators with coal for the use of such foreign railroad in the operation of its railroad.

(*c*) Private cars, which include cars owned or leased or subject to the exclusive control of particular persons or corporations."

It admits that the "system" cars included in class (*a*) are distributed among the coal operators in proportion to their
93 immediate requirements based upon the tonnage rating of their mines, but that in making such distribution foreign railway fuel cars and private cars are not counted. It also alleges that if such foreign railway fuel cars were counted in the general distribution the supply of such cars would be cut off or greatly diminished.

In this case, the question of the distribution of 1,500 so-called private cars, which are held subject to the exclusive control of particular coal companies, is involved. These are the cars included in class (*c*) in the division of this carrier's cars above referred to. The method in which the defendant company acquired these cars and under which the coal companies obtained exclusive control of them is, in brief, as follows:

Arrangements were made for the purchase, through trustees, of the 1,500 cars in question. The Massillon Coal Mining Company and the Wheeling & Lake Erie Coal Mining Company advanced the initial payment of 15 per cent of the purchase price of the cars, aggregating about $150,000. The cars were delivered to trustees, who, in turn, leased them to the coal companies for a period of fifteen years. The trustees then sold the cars to the Wheeling & Lake Erie Railroad Company subject to the leases and the Wheeling & Lake Erie Railroad Company issued first-lien car-trust equipment obligations for the remaining 85 per cent of the purchase price of the cars. It also issued second lien car-trust certificates payable contemporaneously with the above for the 15 per cent of the purchase price advanced by the coal companies, which second lien car-trust certificates were accepted by the coal companies in return for their cash payments, and, by mutual agreement between the Wheeling & Lake Erie Railroad Company and the coal companies, the term of the leases for the exclusive use of these cars was reduced to ten years, subject only to the right of the railroad company to load the cars with traffic moving in the direction of the mines of the coal companies. Assuming, therefore, that
94 the car-trust certificates will be paid as they mature, the unincumbered ownership of these cars will rest in the Wheeling & Lake Erie Railroad Company. It is in evidence that this defendant company is willing to make similar arrangement with any other coal operator on its line who wishes to purchase cars thereunder. The defendant avers that it is without money or credit with which to purchase cars which it needs, and would be glad to have the use of cars acquired in the manner above described

and subject to similar leases by coal companies operating on its line of road.

The testimony shows that the only interest which the Wheeling & Lake Erie Railroad Company has in any of the coal properties owned by the Massillon Coal Mining Company or the Wheeling & Lake Erie Coal Mining Company is that a mine owned by the Wheeling & Lake Erie Railroad Company is leased to the Wheeling & Lake Erie Coal Mining Company.

It is intimated that as the lines of the Hocking Valley Railway, proper, are entirely within the State of Ohio there is some doubt as to the interstate character of its coal business and some question as to the jurisdiction of this Commission is suggested. The testimony shows, however, that the greater portion of its coal business is interstate, and defendant can not know when it transports empty cars to the mines for loading whether such cars will be loaded with intrastate or interstate traffic. Manifestly, it would be impossible to assign cars separately for the two kinds of traffic, and an effort to keep them separate in the movement of empties and of loads would involve endless work and expense. In the case of the Steamer Daniel Ball v. U. S., 10 Wallace, 557, Mr. Justice Field said:

"For whenever a commodity has begun to move as an article of trade from one State to another commerce in that commodity between the States has commenced."

95 In the case of the Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S., 426, the court held—

"That a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable."

In that opinion it is stated:

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.

* * * * * * *

"Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, morever, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

What is one of the principal wrongs which the statute was intended to remedy? Certainly "any undue or unreasonable prejudice or disadvantage in any respect whatsoever;" and section 15 of the act authorizes and empowers the Commission and makes it its

duty, not alone to determine and prescribe "what will be the just and reasonable rate," but "what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed," and the carrier "shall conform to the regulation or practice so prescribed."

96 Therefore there seems to be no room for question, under the decision referred to, as to the original jurisdiction of this Commission over alleged discriminatory practices on the part of carriers engaged in interstate commerce. It may be claimed that the decision in the above case is not decisive and conclusive on this point, yet every reason advanced by the Supreme Court in support of the conclusion that the lower court had not original jurisdiction in rate matters appears to apply with equal force to our view that this Commission has original jurisdiction of discriminatory practices prohibited by the act to regulate commerce.

It is suggested that the Commission has no power to regulate the distribution of cars, and in this connection reference is made to the Commission's decision in the case of Mason v. C., R. I. & P. R. Co., 12 I. C. C. R., 70, in which the complaint was dismissed upon the statement being made that the Commission had no authority to fix rules and regulations governing reciprocal demurrage. Clearly the Commission has no jurisdiction to establish or fix in the first instance rules governing the conduct of the carrier's business or regulating its distribution of cars, but, as held in many decisions of the Commission, it has undoubted power and jurisdiction to deal with complaint that the practice of carriers work unjust discrimination against shippers or localities.

There is an analogy between the jurisdiction of the Commission and that of a court of equity.

In Johnson Coal Mining Co. v. Hocking Valley Ry. Co., 14 Ohio Dec., 209, Judge Dillon said:

"A court of equity will not assume to dictate the policy or business management of a common carrier aside from its clear duty under its charter or the statutes. That function belongs exclusively to the company itself, and will not be interfered with because changes ought to be made as apparently reasonable, necessary or otherwise. But where the common carrier itself adopts as a part of its business policy any advantageous facility for handling

97 freight it must not discriminate in its use by the public, but must afford the facility equally to all, and to this extent equity will interfere by injunction to prevent such favored use thereof and compel its equal service to all."

Aside from the desire of foreign railways to provide a dependable and steady source of supply for fuel, they are able to purchase their fuel coal cheaper by furnishing cars in which to transport it, and their ability to purchase is enhanced if the cars which are sent for fuel supply are not counted in the distribution of cars. The demand for railway fuel and the opportunity of securing some degree of uniformity throughout the year in its coal output enables the coal operator who can take a contract of this nature and be assured of a supply of cars which are not to be counted against him in the

distribution, to work his mines more economically, more nearly to their full capacity and more steadily. He can therefore afford to sell the fuel cheaper than he would under different circumstances and has no doubt to some extent a corresponding advantage in the competitive markets for commercial coal. Obviously a railroad company would not send its cars on to the lines of another railway company, even for its own fuel supply, if they were to be diverted from the intended use and distributed among others than those to whom consigned and for loading with commercial coal to various destinations on the lines of other carriers. To do so would be to deprive itself of the use of its own equipment when most needed, would make its fuel supply wholly uncertain, and, through lack of equipment, would possibly deprive it of the opportunity of handling profitable business.

It therefore seems apparent that foreign railway fuel cars should not be diverted from the purpose for which they are sent, but should be delivered to the operator to whom consigned. It seems equally apparent that such operator should not be given the decided advantage of having, in addition, at a time when no operator can get all of the cars desired, his full percentage or proportion
98 of available system cars just as if he had not been furnished with any foreign railway fuel cars. Intercorporate relations between carriers and the coal companies served by them invite and lead to accusations of favoritism in these connections, which are not at issue in these cases.

In the case of the United states ex rel. Pitcairn Coal Company v. Baltimore & Ohio Railroad Company et al., in which the coal company sued for a writ of mandamus to require the Baltimore and Ohio Railroad Company to cease from subjecting it and other coal companies to undue and unreasonable discrimination in the shipping and transportation of coal, recently decided in the Circuit Court of the United States for the District of Maryland, practically the same questions were involved as are in these complaints, in that the railroad companies parties defendant, did not count the private cars, or the foreign railway fuel cars in the general distribution. In the decision of this case Judge Morris said:

"Under the present system of individual ownership of coal cars it is not unreasonable that the owner shall have the exclusive use of his individual cars; on the contrary it is only just. But under the actual circumstances of the business of the coal trade on the Baltimore and Ohio Railroad, from which it is apparent that the great struggle of the mine operators is to get sufficient cars to ship their product during the winter months, and that their business existence depends upon it, it is not unreasonable to hold that the railroad shall do all that it is practicable to do to avoid subjecting the operators who do not have the use of individual cars to unreasonable disadvantage. While it is true that the existence in the trade of a larger number of individual cars does increase the total car equipment, and so far as the individual cars satisfy the requirements of their owners does increase the number of free-equipment cars which the railroad has at its disposal, it still is a fact that in

times of car shortage the demand is so great that all the
99 mines having individual cars require and get their full
percentage of the railroad equipment without reference to their own cars.

"Under the provisions of the interstate commerce act the railroad must abstain from giving any undue or unreasonable preference or advantage to any mine owner in any respect whatsoever. The duty of the railroad under section 1 is to furnish transportation upon reasonable request. It is not the duty of the shipper, but of the railroad, to provide the required vehicles of transportation. If for convenience or of necessity the vehicles are furnishel by certain of its shippers, and are run regularly on the road just as its own equipment is run, they are, I think, to be treated for some purposes as part of the equipment of the road.

"The regularly run individual cars occupy the tracks and sidings, they are drawn by the locomotives and are operated by the employees of the railroad company and must lessen the facilities in that respect of the independent operators. Indeed an objection of the railroad company to individual ownership of cars is that they require special switching and special cars to collect and classify them in order to haul them to their respective destinations. As the independent mine operators have in this manner to suffer from individual cars being transported as part of the railroad's equipment in such large and constant numbers running regularly on the railroad's lines, it seems only reasonable that when distribution upon percentage is made, all this regular equipment then available should be taken into the calculation and not to first deduct the individual cars and give the indepe-dent mine operators only their percentage of the remaining available equipment. This taking of individual cars into calculation would not be depriving the individual car owner of the exclusive use of his cars and it would not be depriving him of any contractual right which he is entitled to retain and enjoy under the interstate commerce act. The mine
operator would, in any state of the car supply, continue to
100 get the exclusive use of his individual cars as before, but
when the supply was short he would not get so many of the railroad's general equipment. It would be rectifying an unreasonable disadvantage which has been shown to work a serious hardship upon the relator and the independent mine operators in the Fairmont region.

* * * * * * *

"Under the ruling in the present case it becomes unimportant to inquire under just what contractual terms as between the railroad and the mine operators the individual cars are held. Some of these cars have been fully paid for by the railroad company by the working out of the mileage contracts under which they were placed on the road and are now the property of the railroad company, but the mine owners claim that under the contracts they are still entitled to their exclusive use. The exclusive use of other cars now belonging to the Baltimore and Ohio Railroad Company is claimed by virtue of an agreement made with the Monongahela

River Railroad Company, the former owner. It is apparent with regard to the cars now the property of the Baltimore & Ohio Railroad Company that these contracts would require careful scrutiny if it was necessary to go into that matter, and it might become a question to what extent the provisions of the interstate commerce act would permit these cars now the property of the railroad company to be taken out of its distributable car supply.

* * * * * * *

"My finding and ruling is that the relator is entitled to have allotted to it its percentage of all the available car supply equipment, whether of general or individual cars, and that the relator and those in like situation with it are subjected to an unreasonable disadvantage by getting only a percentage of the free Baltimore and Ohio equipment, after having first eliminated therefrom the individual cars; but in no case are the owners of the individual cars or those entitled to them by contract to be deprived of
101 the exclusive use of their individual cars, but the individual cars assigned by the owner to be loaded at specified mines should be charged against the specified mine as part of its pro rata distribution of cars."

As to foreign railway fuel cars, Judge Morris held that these cars were sent for a special purpose and could not be used for any other; that they are not available for commercial shipments, and that the coal so shipped is in a class different from the ordinary commercial shipments, and that therefore such foreign railway fuel cars should not be counted in the general distribution.

Note the difference between the case just referred to and that of the Local [Logan] Coal Company v. Pennsylvania Railroad Company, recently decided in the Circuit Court of the United States for the Eastern District of Pennsylvania. In this case the Pennsylvania Railroad Company was, and for some time had been, observing the following rule:

"Commencing January 1, 1906, assigned cars—i. e., cars for Pennsylvania Railroad fuel supply, foreign railroad cars especially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading—will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all cars will be prorated."

In this it will be noted that the fuel cars, including those for its own fuel supply, and the private cars were counted in the distribution. The Logan Coal Company sued out a writ of mandamus to require the Pennsylvania Railroad Company to discontinue the enforcement of that rule and to assign all specially consigned fuel cars and private cars arbitrarily, giving them to the mines to which such cars were consigned, in addition to their full quota of system cars. In deciding the case, Judge Holland said:

102 "All other obligations laid upon transportation and railroad companies engaged in interstate commerce must be per-

formed consistently with this paramount requirement of equal treatment to all. * * * It must accept the individual cars in connection with its own, so that all shippers of bituminous coal along its route will receive the same treatment and enjoy the same facilities for the transportation of their produce as any other, and when a practice which has been followed is found to work unjustly, and to the disadvantage of one shipper in favor of another, under the broad and peremptory terms of the commerce act it is the duty of the common carrier to so alter and adjust the practice that the discrimination effected against the shippers will be eliminated.

* * * * * * *

"The relator under the order receives a slight advantage, as shown in the above illustration, over its competitors in that it receives a pro rata of the defendant's cars upon a basis calculated on the difference between its rated capacity of the mine and the capacity of all its individual cars. As has been shown this enables the relator to ship somewhat more of its daily output than a competitor who only receives the use of company cars. * * * It is true the defendant company is required to furnish sufficient facilities at all times to transport the merchandise of shippers along its route, but it occurs, in the bituminous coal mining industry in certain of the winter months of the year, that the extraordinary demand for bituminous coal is far beyond the car capacity of the railroad company to transport, and it is conceded that the railroad company is not required to keep a car equipment sufficiently extensive to meet the maximum output at any part of the year, but that it is only required to furnish car facilities to bituminous coal shippers to meet a demand adjusted and regulated to utilize the company's car equipment with uniformity and regularity throughout the year. This, however, it appears the operators are unable to do, and it seems to me that when an operator elects to
103 avail himself of his right under the laws of Pennsylvania to place individual cars upon the company's tracks, he must do so subject to such rules and regulations adopted by the railway company as will work out a result in accord with the requirements of the laws of the State of Pennsylvania and the provisions of the interstate commerce act requiring equal facilities for all.

"The relator is not in any sense discriminated against. First, it has the use of its own cars and its share of company cars upon a basis which gives it a certain advantage over its competitors, and in addition, it receives a certain compensation from the railroad company for its cars. They are placed upon the tracks of the defendant company, and the engines and the train crews and the moving facilities of the company are taxed to transport these individual cars, and there is no reason that I can see why they should not be regarded in the distribution of cars to shippers as part of the equipment, in order that the defendant company may be enabled to treat all shippers the same and, as near as may be, at all times in the year furnish car facilities for the transportation of coal along its line, upon a basis fixed upon the rated capacity of the

mine as ascertained by the method adopted by the railway company. * * *

"What has been said in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company or fuel cars of other corporations purchasing coal from the relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company in its treatment of these cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the relator." * * *

It will thus be seen that the conclusions reached by the Circuit Court of the United States for the District of Maryland and the Circuit Court of the United States for the Eastern District of Pennsylvania as to the propriety of counting the foreign
104 railway fuel cars in the distribution of equipment are diametrically opposed. With the highest respect for the views of the court in the district of Maryland, we are of the opinion that the conclusions reached by the court for the eastern district of Pennsylvania are in accordance with the spirit of the act to regulate commerce and appear to be supported by the great weight of authority on the subject.

On page 68, of Report on Discriminations and Monopolies in Coal and Oil, the Commission said:

"This system of allotting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same is unjust and unfair unless fuel coal is taken from all of the mines on the line of the road in the same proportion that cars are distributed."

In the same report, page 81, is incorporated the following recommendation:

"Third. That after reasonable time carriers engaged in interstate commerce be prohibited from using "individual" or "private cars" for the handling of coal traffic; and further, that when a carrier is unable to furnish all the cars required by all the shippers upon its line, all cars in service on the road, excepting individual or privately owned cars until their use is prohibited, be treated as the equipment of the company and subject to distribution according to the system or plan in effect at that time."

It is to be noted that the recommendation of the Commission refers to "private" or "individual" cars in fact; not to cars which are private in name only.

We are of the opinion that the practice of these defendants in failing or refusing to make any account of foreign railway fuel cars in the distribution of cars among the operators is discriminatory and should be discontinued. We are equally of the opinion that a distribution of these specially consigned foreign railway fuel cars among operators, to be used for purposes for which they
105 were not intended, as seems to have been contemplated by the order of the Ohio Railroad Commission, would be unwarranted and unfair. The total of the foreign railway fuel cars, the private cars and the system cars should be taken into con-

sideration in determining the distribution. If the number of foreign railway fuel cars or of private cars is less than the percentage or proportion of the company to which such cars are consigned or assigned, that company should be given all of the foreign railway fuel cars consigned to it and all of the private or leased cars belonging to it, and a sufficient number of system cars to make up its proportion. On the other hand, if the number of foreign railway fuel cars consigned to it and of private cars assigned to it is greater than its proportion, all such cars so consigned or assigned to it should be delivered to it and the available system cars should be divided among the other operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars and private cars have been consigned, assigned, and delivered.

As before stated, at one time the defendant—the Hocking Valley Railway Company—did count foreign railway fuel cars in the distribution, and it discontinued this practice because of the threat that if it continued so to do the supply of such cars would be cut off or materially reduced. Consignor may not impose conditions which require carriers to indulge in unjust discrimination. Consignor may impose conditions as to the use of its own cars and it may insist that its consignment orders with relation thereto shall be observed. It may not dictate as to the manner of distribution of the system cars of a carrier. The only interest consigning road can have in whether or not its cars are counted is the effect it may have upon the price it may have to pay for the coal.

It is also shown that the Hocking Valley Railway Company was influenced to discontinue counting these cars in the assign-
106 ment, because it found that competitors were not counting them. When this question is definitely settled all will follow the same principle and all be on an equality, and the effect cannot be prejudicial to the interests of one as against all. It does not seem that the supply of fuel cars will be either increased or diminished, except as the actual needs of the carriers furnishing such cars may affect the supply.

This Commission is not in this case required to pass upon the transactions involved in the purchase and lease of the 1,500 private cars.

In Rice, Robinson & Witherop v. W. N. Y. & P. R. Co., 4 I. C. C. Rep., 149, it is stated:

"It is not the business of the shipper to furnish the vehicle of transportation. This is the duty of the carrier. Under its franchise the carrier must do more than construct his roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open impartially to all shippers of like traffic. If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: He must furnish like vehicles to all competitors in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates."

It is admitted that the cars so held under lease are devoted to the

exclusive use of the company holding the lease and that they are not counted against such company in the distribution of the available cars. The question is: Is such failure to count these cars an unjust discrimination against other coal mine operators on the line of defendant company, the Wheeling & Lake Erie Railroad Company? This question we are constrained to answer in the affirmative. The only consideration which these coal companies have paid for the leases in question is the advancement of $150,000. in cash, for which, in a comparatively short period, they received an equivalent amount of interest bearing car trust certificates.

107 Assuing that these leases are valid, we are of the opinion that it is a discrimination against other coal operators to give the lessees their full proportion of the available system cars just as if they did not have the use of the so-called private cars. There is always possibility that discrimination may be intensified or aggravated by conditions arising or occurring under which the carrier will be unable, because of insufficient power or inadequate terminals to promptly and efficiently transport all of the tonnage offering. We are of the opinion that the so-called private cars herein referred to should be counted and considered in the distribution of equipment in the same manner as hereinbefore provided for foreign railway fuel cars; that is, the lessees of these cars should be given full and exclusive use of them, but should not be given a division of the system cars except when the supply of the so-called private cars and of foreign railway fuel cars assigned to them is less than their proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars.

An order will be entered accordingly.

Order.

Upon the foregoing report—

It is ordered, That the defendants, the Hocking Valley Railway Company and the Wheeling & Lake Erie Railroad Company, be, and they severally are hereby, notified and required, on or before the 15th day of September, 1907, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars or of leased or so-called private cars in the distribution of coal cars for interstate shipments of coal among the various coal operators along their lines.

108 It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 15th day of September, 1907, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, and leased or so-called private cars in determining the distribution of coal cars among the various coal operators along their lines on interstate shipments of coal and if the number of foreign railway fuel cars or leased or so-called private cars, or both, is less than the

percentage or proportion of the company to which such cars are consigned or leased, then that company must be given all the foreign railway fuel cars consigned to it and all the cars owned or leased by it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it and the leased or so-called private cars delivered to it is greater than its proportion, all such cars so consigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars."

109 DEFENDANT'S EXHIBIT "F."

* * * * * * *

Order.

At a General Session of the Interstate Commerce Commission Held At Its Office in Washington, D. C., on the 13th Day of April, A. D. 1908.

Present: Martin A. Knapp, Judson S. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1294.

GLENN W. TRAER, Receiver of the Illinois Collieries Company,

v.

CHICAGO & ALTON RAILROAD COMPANY.

No. 1295.

SAME

v.

CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY OF ILLINOIS.

No .1317.

SAME

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties,
110 and full investigation of the matters and things involved having been had, and the Commission having, on the date thereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendants, the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Company of Illinois, and the Illinois Central Railroad Company, be, and they severally are hereby, notified and required, on or before the 1st day of July, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars, or of leased or so-called private cars, or of their own fuel cars in the distribution of coal cars for, or affecting interstate shipments of coal among the various coal operators along their lines.

It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 1st day of July, 1908, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carriers' own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carriers' own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars delivered to it, and the carriers' own fuel cars assigned to it, is greater than its proportion, all such cars so consigned or assigned to it or
111 leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the mine or mines to which the foreign railway fuel cars, carriers' own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars, and the one to whom carriers' own fuel cars are assigned, must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars and of carriers' own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carriers' own fuel cars, and so-called private cars."

* * * * * * *

112 *Order*

At a General Session of the Interstate Commerce Commission Held at Its Office in Washington, D. C., on the 2nd Day of June, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1322.

RAIL & RIVER COAL COMPANY
v.
BALTIMORE & OHIO RAILROAD COMPANY.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereof:

It is ordered, That the defendant, the Baltimore & Ohio Railroad Company, be, and it is hereby, notified and required, on or before the 1st day of August, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing, with respect to interstate shipments of coal, the present practice or regulation of failing or refusing, in times of coal car shortage, to count railway fuel cars and leased or so-called private coal cars against the distributive shares of available system
113 coal cars which the coal operators, to whom said leased or so-called private coal cars belong or said foreign railway fuel cars are consigned, are entitled to according to the ratings of their respective mines.

It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before said 1st day of August, 1908, and during a period of at least two years thereafter to maintain and enforce, with respect to interstate shipments of coal, a practice or regulation which, in times of coal-car shortage, shall require foreign railway fuel cars and leased or so-called private cars to be counted against the distributive shares of available cars to which the respective operators, to whom the leased or so-called private cars belong or foreign railway fuel cars are consigned, are entitled according to the respective ratings of their mines; and that the said leased or so-called private cars shall always be delivered to the operators owning them and the said foreign railway fuel cars shall always be delivered to the operators to whom they are consigned by said foreign railway; and that in case said leased or so-called private cars or foreign railway fuel cars so delivered to the operator owning them or to whom they have been consigned are not sufficient in number to fill out his distributive share of available system cars,

enough system cars are to be added to make up his share according to the rating of his mine as fixed and determined by the system of mine rating on the lines of the defendant."

114 C. P., Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Agreement of Counsel.

It is agreed between Counsel that this case shall be disposed of in the following manner:

First. That a verdict shall be taken in the sum of Twelve Thousand Five Hundred Dollars in favor of the plaintiff, and that said verdict shall be subject to the following questions of law, which are hereby reserved:

1st. As to whether or not under the testimony that appears in this case the defendant is bound by the method of distribution of its coal cars that was practiced by it, by which individual cars were not charged against the distributive share of the mine during the period of the action.

2nd. As to whether or not the rules prescribed by the Interstate Commerce Commission, and their various orders which appear of record herein, are controlling in determining what distribution of cars should have been made to the plaintiff, notwithstanding the system of distribution which the defendant at that time practiced; it being the agreement of the parties that, if under the practice, the law and the rules, the plaintiff company should have been charged with individual cars, that then judgment shall be entered in favor of the defendant N. O. V.

3rd. As to the question of the jurisdiction of the court to entertain the action at all.

Testimony closed.

115 Court of Common Pleas of Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Charge of the Court.

Gentlemen of the Jury, in the case in which you were sworn, namely, the Stineman Coal Mining Company vs. The Pennsylvania

Railroad Company, the Counsel have shortened the labors of the jury and perhaps lengthened the labors of the Court, by an adjustment or agreement as to the amount of the verdict which should be rendered by you; that amount being $12,500.00, subject to the reservation of the question of law involved in a certain stipulation which has been filed and agreed to by Counsel, and also subject to the reservation on the points submitted by Counsel for defendant, which I will not read to you, which, if sustained by the Court, would perhaps render a verdict for the defendant. We reserve all of the points presented by Counsel for the defendant and will consider them as questions of law hereafter. So far as the jury is concerned, your labors are ended and you should simply render a verdict for $12,500. in favor of the plaintiff, and the Prothonotary will take that verdict. The defendant's points are refused, subject to the question of law reserved.

116 Court of Common Pleas of Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Defendant's Points.

Assignment of Error No. 2.

("1. The plaintiff is not entitled to recover because this court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by the Acts of Congress, commonly known as the "Interstate Commerce Acts," in the Federal tribunals.")

Assignment of Error No. 3.

("2. As it is admitted that if the distribution made by the defendant throughout the period of the action had been in accordance with the system or method which the Interstate Commerce Commission has prescribed and defined in the decisions and orders given in evidence as that which should govern the distribution by a carrier of cars, the plaintiff would not have received any more cars than were actually delivered to it by the defendant, the plaintiff is not entitled to recover, and your verdict should be for the defendant.")

"3. The plaintiff is not entitled to recover in the present action any loss which it may have sustained because of the non-receipt of cars from the defendant which, when loaded, would have been consigned by it to points without the State of Pennsylvania, even though the coal which would have been loaded therein would have been

sold by the plaintiff to purchasers to whom title to the same passed at the mine."

Assignment of Error No. 4.

("4. Under the law and the evidence the plaintiff is not entitled to recover.")

117 Court of Common Pleas of Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Verdict of the Jury and Judgment Thereon.

And now to wit: Nov. 12, 1912, we, the Jurors empaneled in the above entitled case, find Verdict for Plaintiffs $12,500.

—— ——, *Foreman.*

Judgment was subsequently entered for the full amount of said verdict.

118 Court of Common Pleas of Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Motion for Judgment Non Obstante Veredicto.

Now, November 14, 1912. defendant company moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record and for judgment non obstante veredicto upon the whole record.

MURRAY & O'LAUGHLIN,
Attorneys for Defendant Company.

Now, November 14, 1912, service hereof accepted and granting issuance and service of rule waived.

A. M. LIVERIGHT,
Of Counsel for Plaintiff.

Filed November 14, 1912. John H. Moore, Prothonotary.

119 Court of Common Pleas of Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Motion in Arrest of Judgment and for New Trial.

Now, November 14, 1912, defendant company moves in arrest of judgment and for a new trial for the following reasons:

First. The Court erred in the admission and rejection of evidence.

Second. The Court erred in the general charge to the jury and in answer to points of plaintiff and defendant.

Third. The verdict of the jury is against the weight of evidence.

Fourth. The verdict of the jury is contrary to the law applicable to this case.

Fifth. And for other errors and irregularities in the case.

MURRAY & O'LAUGHLIN,
Attorneys for Defendant Company.

Now, November 14, 1912, service hereof accepted and granting issuance and service of rule waived.

A. M. LIVERIGHT,
Of Counsel for Plaintiff.

Filed November 14, 1912. John H. Moore, Prothonotary.
Sur Motion and Rule in Arrest of Judgment and for New Trial.
Sur Motion and Rule for Judgment non obstante veredicto.

120 Court of Common Pleas of Clearfield County, May Term, 1908.

No. 222.

STINEMAN COAL MINING COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Opinion and Decree.

The plaintiff in this case brought suit against the defendant company to recover for alleged discrimination in the furnishing of cars for the coal trade of the plaintiff company. The plaintiff company is an operator located in Cambria County, on the main line of the Pennsylvania Railroad, and was one of the operators doing

business in what was known as the Mountain Division for purposes of car distribution. The complaint was that it was unfairly treated and discriminated against by the defendant company in its distribution of cars for coal trade service and that the defendant unreasonably and unjustly gave a preference in the distribution of cars to the Berwind-White Coal Mining Company, a corporation doing business on a sub-division called the Scalp Level Division.

After proceeding with the trial for a day or so an adjustment as to the amount of verdict, together with the questions of law reserved, was reached by counsel, as appears in the following stipulation, namely:

"It is agreed between Counsel that this case shall be disposed of in the following manner:

"First. That a verdict shall be taken in the sum of $12,500 in favor of the plaintiff, and that said verdict shall be subject to the following questions of law which are hereby reserved.

"1. As to whether or not under the testimony that ap-
121 pears in this case the defendant is bound by the method of distribution of its coal cars that was practiced by it, by which individual cars were not charged against the distributive share of the mine during the period of the action.

"2. As to whether or not the rules prescribed by the Interstate Commerce Commission and their various orders, which appear of record herein, are controlling in determining what distribution of cars should have been made to the plaintiff, notwithstanding the system of distribution which the defendant at that time practiced; it being the agreement of the parties that if under the practice, the law and the rules, the plaintiff company should have been charged with individual cars, that then judgment shall be entered in favor of the defendant N. O. V.

"3. As to the question of the jurisdiction of the Court to entertain the action at all."

In accordance with this stipulation a verdict of the jury was taken in the sum of $12,500. Whereupon the defendant moved for a new trial and for judgment non obstante veredicto, which are now to be disposed of.

The principal question contended for on behalf of the defendant is that this Court does not have jurisdiction of the cause of action. It is conceded by the learned counsel for defendant that this Court is bound by the decision of the Supreme Court of the State of Pennsylvania in the case of the Puritan Coal Mining Company against the Pennsylvania Railroad Company, recently decided and which will be reported, as shown by the Advance Reports, in 237 Pa. St. 420. The case, as we understand it, is conceded to be similar in its facts to that case. The plaintiffs in both cases were located in the Mountain Division. They were subject to the same region distribution, and it is alleged were discriminated against alike in car service by reason of the preference given in special orders in favor of the Berwind-White Coal Mining Company, of the
122 Scalp Level Division. In this case, however, the defendant offered a series of proceedings before the Interstate Commerce

Commission in a number of cases brought by parties before said Commission, for the adjustment of certain alleged matters of car distribution, against a number of railroads therein named and which appear in the testimony under the heading of Defendant's Exhibits "A," "B," "C," "D," "E," "F," and "G." This testimony of the action of the Interstate Commerce Commission respecting the matters involved was not in evidence in the Puritan case, and because of that it is now claimed by the learned Counsel for defendant that this case differs from said Puritan Coal Mining Company case on the question of jurisdiction. The present plaintiff was not a party in any of those proceedings. They all relate to the system *of* method of distribution prevailing on the different railroads named in the said complaints to the Interstate Commerce Commission and resulted in orders or decrees being made regulating the kind and character of cars to be distributed to the coal service and the proper method of making distribution to shippers along the lines of said railroads. Not to go into detail with respect to these several orders of the Interstate Commerce Commission, it is sufficient for the purposes of this case, we believe, to say that none of the said orders of the Interstate Commerce Commission are shown to antedate the period of the action in this case, the earliest being that against the Hocking Valley Railway Company (Exhibit "E"), decided July 11, 1907. It is contended on behalf of the defendant company that the existence of these orders, especially that of Exhibit "A" with reference to the Pennsylvania Railroad, decided in 1910, indicates that the Interstate Commerce Commission have occupied the field and thereby ousted the jurisdiction of all State Courts with reference to the subject matter therein passed upon. It is, hence, claimed that the proofs in this case differentiate it from the decision in the Puritan Coal Mining
123 Company case, *supra*. With this contention we cannot agree. The decision of the Supreme Court in the Puritan Coal Mining Company case must be considered as having been decided with full knowledge of the fact that the Interstate Commerce Commission had, in special cases brought to their attention, promulgated certain rules and orders controlling future car distribution, that is, distribution made subsequent to the date of the orders of the Interstate Commerce (Commission). The proof of that is that one of the cases cited by Mr. Justice Stewart, in his opinion, is that of Illinois Central Railroad Company vs. Interstate Commerce Commission, 215 U. S. 481, which case especially involved an Interstate Commerce Commission order of distribution. We are fully of the opinion that this case, therefore, is not only exactly similar in its facts to the Puritan Coal Mining Company case but that it is governed in all respects on the law by that opinion.

Mr. Justice Stewart, after quoting from decisions of the Supreme Court of the United States, thus summarizes: "We derive from this opinion these inevitable conclusions: (1) that where Congress prescribed a particular act, not in itself an offence at common law, jurisdiction with relation thereto attaches to the Federal Courts; (2) where the act is an offence at common law, and made so as well by

State statute, in such case, except as other reasons may be shown, there is concurrent jurisdiction of it in the State courts; (3) that the Interstate Commerce Act does not attempt any more than does the common law to define what particular acts shall constitute unlawful discrimination, but commits that to the Interstate Commerce Commission; (4) that when this Commission has by its orders declared any particular practice or regulation observed by an interstate corporation as unreasonably discriminating, it is as though Congress has especially legislated with respect thereto, and such circumstance draws exclusive jurisdiction of the offence to
124 the Federal Tribunal; (5) that except as to the thing the Commission had defined and denounced as undue discrimination, the discrimination complained of may be adjudged by the State courts according to their own statute, or the common law as the case may be." The learned Justice then proceeds to show how the Commission has exercised its jurisdiction, especially citing the case of Illinois Central Railroad Company vs. Interstate Commerce Commission, supra, as an illustration of an adjudication which formulated general rules for the observance of all railroads; and holding in the opinion that the regulation therein announced "is as much the law of the land as though written in the lines of the Interstate Commerce Act and that having been legislated upon by the Commission exclusive jurisdiction with respect thereto vests in the Federal tribunal." In distinguishing the Puritan case the learned Justice then says: "Here it is not complained that defendant had disregarded any order of the Commission; nor has any order of the Commission even remotely regulating the subject of the complaint here been shown. What is complained of is that the defendant having voluntarily adopted a system for the distribution of its cars which it must have regarded as just and equitable, and from which it makes no claim to be released, openly and flagrantly disregarded it by daily distributing to the Berwind-White Coal Company a much larger number of cars than its rating called for, while furnishing complainant with less than it was entitled to under its rating. The grouping of plaintiff's mines in a class with others for purposes of service; the determination of the total number of cars to be devoted to such service; the ratings of the several mines within the group and the pro rata of distribution, were not matters regulated by the order of the Commission, but matters decided upon by the defendant company with a view to avoid prejudice to the shipper. Had the plaintiff been dissatisfied with the regulation it could have appealed to the Commission to correct it; had its appeal been sustained and followed by an order of amendment or cor-
125 rection of the regulation, then, upon subsequent disregard of the regulation as amended, plaintiff's only forum for relief would have been the Federal Court, since in that case again Congress would have taken possession of the field. But there is nothing of that kind here; nothing but a case of discrimination pure and simple; not a specific offence created by the express terms of the Federal statute, not an offence against any order of the Commerce Commission, but an offence which could fall within the Federal

statute and the common law as well, and so be held to have been legislated upon by Congress, only as the Interstate Commerce Commission has so declared. Our own State statute rests for its authority on the police power of the State, and its sole object is to prohibit common carriers which derive all their powers from the state, and have been granted these to the end that they may serve public necessity and convenience, from practicing undue and unreasonable discrimination between shippers in the service they are created to render. The exercise of this power in the way indicated is not interfered with by the Interstate Commerce Act in the absence of action by the Commerce Commission specifically directed against the particular matter complained of. The thing condemned by our State Statute and by the common law was a purely incidental matter indirectly affecting interstate commerce, just as was the discrimination in the case of the Missouri Pacific Ry. vs. Larabee Mills, supra (211 U. S. 612). The two cases on principle cannot be distinguished and we but follow the plain guidance of that case in holding that the power of the State with respect to the subject matter of the present controversy remains undisturbed. It was not a question in the case whether the cars denied the plaintiff were intended for shipment within the State or beyond. It was sufficient that the offence was committed within the State."

The above quotation from the Puritan case is equally applicable to the facts in this case. The offence alleged here is that of "discrimination pure and simple." No specific offence created
126 by the express terms of the Federal statute is alleged to have been violated. Neither is any offense against any order of the Commerce Commission set up as the basis of recovery. The period sued for, between April 1st, 1902, and January 1st, 1905, antedates all general rules, regulations or orders of the Interstate Commerce Commission which could by any construction be said to be applicable to the case in hand. We are of opinion therefore that there is nothing offered in defense in this case which would justify a ruling that the State court did not have jurisdiction.

It is contended, however, aside from the general question of jurisdiction, that under the reserved questions involved in the stipulation or agreement of Counsel judgment should be entered in favor of the defendant non obstante veredicto, for the reason that said stipulation practically admits that had plaintiff been charged with individual cars it received all to which it was entitled. The language of the last clause of the second reserved question is as follows: "It being the agreement of the parties that if under the practice, the law and the rules, the plaintiff company should have been charged with individual cars, that then judgment should be entered in favor of the defendant N. O. V." It is not exactly clear what is meant by this stipulation. "The practice" referred to we assume to be the practice of the Railroad Company, that is, its method of distribution in not counting individual cars against the party receiving them. "The law" we assume to be the law which should govern this case. And "the rules" referred to we assume to be the rules or orders of the Interstate Commerce Commission put in evi-

dence in this case. As stated, the case was not tried to a finish. There is no evidence in the case which would show that individual cars were operated in favor of the plaintiff company to the extent that it would fill its full pro rata share of cars under any system of distribution. The agreement on the verdict, as per the stipulation, we assume does establish, however, first, that there was dis-
127 crimination practiced against the plaintiff and in favor of Berwind-White Coal Mining Company as declared on; second, that plaintiff was entitled to $12,500 as a measure of its damages for such discrimination; third, that it did receive for its use individual cars to the extent which the pro rata of cars to the Mountain Division entitled it had such individual cars been charged against its rating in accordance with the present order or rules of the Interstate Commerce Commission. This also has been disposed of, as we believe, by the opinion in the Puritan Coal Mining Company case, supra, in the following language: "The complaint that the court did not take into account the private or individual cars in determining the extent of the discrimination against the plaintiff introduces matter foreign to the issue in the case. The issue had regard to the cars owned by the defendant company. The period of discrimination complained of antedated the decision in the cases of Interstate Commerce Commission v. Illinois Central R. R. supra, where it held to be the duty of the interstate carrier in making distribution of its cars in times of shortage to include in the computation private cars in addition to its own. In making its distribution of its own cars, exclusive of those owned by private parties, the defendant company was observing not only its own practice but that which had up to that time been prevailing. However general the practice, it was, as held in the cases referred to, in plain violation of the Interstate Commerce Act. In making the present objection the defendant company would set up its own disregard and violation of law in mitigation. It had its own purpose to serve in excluding private cars from the computation. Whatever the purpose was, the scheme was acquiesced in by all shippers in the district as fair and equitable, with full knowledge of all facts, since so far as appears, none made complaint. Now that it has been made to appear that the defendant company disregarded its own basis of dis-
tribution, not because it was inequitable for the reason that
128 the private cars had not been included in the computation, but solely with a view of giving a particular shipper an unlawful preference, it seeks to mitigate the consequences of its own dereliction by having applied a rule it defied when it established the bases of distribution upon which all acted throughout the entire transaction." This view of the law is reasonable and equitable from every standpoint. The Railroad Company saw fit during the period of the action of this case to adopt and carry into effect a rule of distribution excluding private cars from computation in charging against the individual shipper. It then proceeded to distribute its unassigned or system cars to the several shippers along its line according to their rated capacity. This undoubtedly gave a great preference and advantage to the shipper owning individual cars.

Having adopted it, however, can it now either in mitigation or as a complete offset to a claim of damages get immunity because of such apparent inequitable practice. To do so would put a premium on its own wrong doing. It may well be assumed that the preferred shipper likewise used individual and assigned cars. The complaint sued for is distinctly against the practice of discrimination as to unassigned or system cars, as to which the verdict establishes the fact of such discrimination. Under the then prevailing practice of the defendant company the plaintiff may have been forced to buy, lease or otherwise arrange for individual cars as a matter of self protection against the very discrimination alleged. If it could not get system cars, it may have been obliged to resort to individual cars to maintain its standing as a coal operator. To buy or lease cars meant an outlay of considerable money. To get individual cars from other operators, as is often done, and seems to be indicated by some of the testimony offered in this case, usually involves a sacrifice to some extent of the price to be received. As we look at it, therefore, the question of the individual cars used by the plaintiff does not enter into the issue involved in this case and certainly should not be used to deprive plaintiff of the damages agreed on as measuring
129 the injury sustained by plaintiff because of its being deprived of its pro rata share of system cars.

All other questions raised in the reasons urged in the motion for new trial are conceded to have been disposed of in the Puritan case.

Decree.

Now, January, 27th, 1913, the motion and rules for new trial and for judgment non obstante veredicto in favor of the defendant are hereby overruled and discharged, and judgment is directed to be entered on the verdict in favor of the plaintiff on payment of the jury fee as required by law. To this action of the Court, at request of Counsel for defendant, exception is noted and bill sealed.

By the Court.

(Signed) ALLISON O. SMITH, *P. J.*

Filed 27 Jan. 1913. John H. Moore, Prothonotary.

130 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Appeal from the Judgment of the Court of Common Pleas of Clearfield County.

Assignments of Error.

1. The Court below erred in overruling the defendant's motion to dismiss action for want of jurisdiction of the Court below to entertain the same. (Appendix, page 237*a*.)

2. The Court below erred in refusing to charge as requested in the defendant's first point, which point was as follows:

"1. The plaintiff is not entitled to recover because this court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by the Acts of Congress, commonly known as the 'Interstate Commerce Acts,' in the Federal tribunals."

(Page 8.)

3. The Court below erred in refusing to charge as requested in the defendant's second point, which point was as follows:

"2. As it is admitted that if the distribution made by the defendant throughout the period of the action had been in accordance with the system or method which the Interstate Commerce Commission has prescribed and defined in the decisions and orders given in evidence as that which should govern the distribution by a carrier of cars, the plaintiff would not have received any more cars than were actually delivered to it by the defendant, the plaintiff is not entitled to recover, and your verdict should be for the defendant."

(Page 8.)

4. The Court below erred in refusing to charge as requested in the defendant's fourth point, which point was as follows:

131 "4. Under the law and the evidence the plaintiff is not entitled to recover."

(Page 8.)

5. The Court below erred in overruling the defendant's motion for judgment non obstante verdicto.

(Appendix, page 249*a*.)

6. The Court below erred in entering judgment on the verdict in favor of the plaintiff.

(Appendix, page 249*a*.)

132 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Appeal by Defendant from the Judgment of the Court of Common Pleas of Clearfield County.

Filed June 27, 1913.

MESTREZAT, *J.:*

This is an action of trespass to recover damages for loss sustained by the plaintiff company by reason of unlawful discrimination against it by the defendant in furnishing coal cars. The period of action was from April 1, 1902, to January 1, 1905. At the conclusion of the testimony of the trial of the cause, the case was disposed of by the following stipulation of counsel filed of record:

"First. That a verdict shall be taken in the sum of $12,500 in favor of the plaintiff, and that said verdict shall be subject to the following questions of law which are hereby reserved: "1. As to whether or not under the testimony that appears in this case the defendant is bound by the method of distribution of its coal cars that was practiced by it, by which individual cars were not charged against the distributive share of the mine during the period of the action. "2. As to whether or not the rules prescribed by the Interstate Commerce Commission and their various orders, which appear of record herein, are controlling in determining what distribution of cars should have been made to the plaintiff, notwithstanding the system of distribution which the defendant at that time practiced: it being the agreement of the parties that if under the practice, the law and the rules, the plaintiff company should have been charged with individual cars, that then judgment shall be
133 entered in favor of the defendant N. O. V. "3. As to the question of the jurisdiction of the Court to entertain the action at all."

In accordance with the stipulation, the court directed a verdict for the plaintiff for the amount agreed upon, refusing the defendant's points subject to the questions of law reserved. Subsequently the court overruled the motions for a new trial and for judgment n. o. v. and directed judgment to be entered on the verdict. The defendant has appealed.

The assignments of error are to the refusal of defendant's motion to dismiss the action for want of jurisdiction; the refusal of binding instructions on the same ground and on the further ground that if the distribution of cars by the defendant had been in accordance with the system which the Interstate Commerce Commission has prescribed in the decisions given in evidence the plaintiff company

would not have received any more cars than it did receive; the overruling of the motion for judgment n. o. v.; and the entry of judgment on the verdict.

It will be observed that there are two questions in the case. The first and principal question is as to the jurisdiction of the court to hear and determine the cause, and that has been settled against the defendant's contention by our decisions in Puritan Coal Mining Company vs. Pennsylvania Railroad Company, 237 Pa. 420, Sonman Shaft Coal Company vs. Pennsylvania Railroad Company and Clark Brothers Coal Mining Company vs. Pennsylvania Railroad Company, opinions in the last two cases being handed down herewith. In this case, as in the Clark case, the defendant put in evidence a series of proceedings before the Interstate Commerce Commission in certain cases brought by shippers before the Commission for adjustment of car distribution against various railroad companies. The proceedings resulted in orders by the Commission regulating the kind and character of the cars to be distributed to the coal service and the proper method of making distribution to shippers along the lines of the respective railroads. The plaintiff here was not a party to any of these proceedings. We deem it sufficient to say that the orders of the Interstate Commerce Commission are not involved in this case. The suit is not brought on them,
134 nor does the plaintiff company claim that it has been injured because the defendant violated them. What the plaintiff company does claim and what it seeks to recover here is damages for the wrongs committed against it by the defendant in violation of the latter's common law and statutory duty as a common carrier. In such cases we shall not deny access to our courts by the injured citizen seeking relief by reason of the enactment of a Federal statute dealing with interstate commerce until the jurisdiction is denied by a court having the power to finally adjudicate the question.

The other defense set up by the defendant to defeat recovery is a little singular to say the least. By the stipulation filed of record by the parties it appears that by the method of distribution of cars among shippers adopted and practiced by the defendant during the period of this action individual cars were not charged against the distribution share of the mine. In violation of this system, discrimination in the distribution was practiced against the plaintiff and in favor of the Berwin-White Coal Mining Company as averred in the statement, resulting in damages to the plaintiff of the stipulated sum of twelve thousand five hundred dollars. The defendant now claims that it is not liable for this discrimination because its own rules of distribution were in violation of the present order or rules of the Interstate Commerce Commission by which the plaintiff's rating would have been charged with its individual cars, and the plaintiff company would then have received all the cars it was entitled to. In other words, the defendant concedes that it ignored its own rules and disregarded its own basis of distribution in furnishing cars to the plaintiff and discriminated against the latter and in favor of a competing shipper, but seeks to justify its unlawful conduct and injury to the plaintiff on the ground that in

making the distribution it had violated a subsequently promulgated order of the Interstate Commerce Commission. We have expressed our views on the merits of such a defense in the Puritan case in which the present defendant being also the defendant in
135 that case successfully attempted under like circumstances to avoid liability for similar discriminatory acts on the same ground. The pertinent language of our opinion in that case is a sufficient answer to the defendant's contention (p. 458): "In making distribution of its own cars, exclusive of those owned by private parties, the defendant company was observing not only its own practice but that which had up to that time been prevailing. However general the practice, it was, as held in the case referred to, in plain violation of the Interstate Commerce Act. In making the present objection the defendant company would set up its own disregard and violation of law in mitigation. It had its own purpose to serve in excluding private cars from the computation. Whatever the purpose was, the scheme was acquiesced in by all shippers in the district as fair and equitable, with full knowledge of all facts, since so far as appears, none made complaint. Now that it has been made to appear that the defendant company disregarded its own basis of distribution, not because it was inequitable for the reason that the private cars had not been included in the computation, but solely with a view of giving a particular shipper an unlawful preference, it seeks to mitigate the consequence of its own dereliction by having applied a rule it defied when it established the basis of distribution upon which all acted throughout the entire transaction."

The judgment is affirmed.

136 In the Supreme Court of the United States, — Term, 1913.

No. —.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
STINEMAN COAL MINING COMPANY, Defendant in Error.

COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

On this 23rd day of September in the year of Our Lord one thousand nine hundred and thirteen, before me the undersigned, a Notary Public in and for the said County and State, resident at Clearfield, Pennsylvania, personally appeared Jas. P. O'Laughlin who being duly sworn according to law doth depose and say that he served a copy of the Specifications of Error of the Plaintiff in Error in the proceeding in error to the Supreme Court of Pennsylvania upon Alfred M. Liveright of the attorneys of record for the said Stineman Coal Mining Company, the defendant in error, plaintiff below, by handing him a true and correct copy of the said Specifications of Error, on the 23rd day of September A. D. 1913.

JAS. P. O'LAUGHLIN.

Sworn to and subscribed before me this 23rd day of September A. D. 1913.

[Seal Walter Welch, Notary Public, Clearfield, Penna.]

WALTER WELCH,
Notary Public.

Commission Expires Feb. 21, 1915.

137 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Appellant.

Præcipe Indicating the Portions of the Record to be Incorporated into the Transcript of the Record on Writ of Error.

To the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania:

Pursuant to Section 1 of Rule 8 of the Rules of Practice of the Supreme Court of the United States, you are respectfully requested to incorporate into the Transcript of the Record to be certified to the Supreme Court of the United States, and there filed in connection with the Writ of Error heretofore sued out from the Supreme Court of Pennsylvania to the said Supreme Court of the United States in the above entitled case, the following portions of the Record:

138 1. Original statement of plaintiff's claim (printed on page 208*a* et seq. of the Appendix to Appellant's Paper Book filed in this case in the Supreme Court of Pennsylvania, a copy of which is hereto attached and marked Exhibit "A").

2. Opinion of Trial Judge sur plaintiff's motion for leave to file amended statement (printed on page 215*a* et seq. of Exhibit "A" hereto attached.

3. Plaintiff's amended statement (printed on page 220*a* et seq. of Exhibit "A" hereto attached).

4. Defendant's plea (printed on page 227*a* et seq. of Exhibit "A" hereto attached).

5. Motion to dismiss action for want of jurisdiction (printed on page 227*a* et seq. of Exhibit "A" hereto attached).

6. Plaintiff's answer to rule to dismiss action (printed on page 230*a* et seq. of Exhibit "A" hereto attached).

7. Opinion of Trial Judge sur motion and rule to dismiss action (printed on page 232*a* et seq. of Exhibit "A" hereto attached).

8. The following excerpts from the testimony:

The testimony of George W. Clark (printed on pages 52*a* and 53*a* of Exhibit "A" hereto attached, beginning with the question on page 52*a* "Q. Where do you live?" and ending with the answer

on page 53*a* "A. It was carried out so far as I know at that time, yes."

Stipulation on page 54*a* reading as follows:

"It is admitted by the parties, that although substantially all of the plaintiff's coal, on account of which recovery is sought, would have been sold f. o. b. the mines, that some of it would have been consigned by the plaintiff at the mine to the ultimate consumer at points outside the State of Pennsylvania."

The testimony of M. Trump on pages 54*a*, 55*a*, and 56*a*, beginning with the question "Q. What position did you hold with The Pennsylvania Railroad Company in the years 1902, 3 and 4?" and ending with the answer on page 56*a* "A. Well Altoona and Harrisburg combined, yes sir."

Offer of opinions and orders of the Interstate Commerce Commission (printed on page 56*a* of Exhibit "A" hereto attached) as follows:

"Mr. GOWEN: If the Court please, we offer in evidence duly certified copies of seven decisions and orders of the Interstate Commerce Commission, which deal with and prescribe the method of distribution to be followed by carriers of coal cars where a percentage distribution is required. (Papers marked Defendant's Exhibits "A" to "G" inclusive).

Mr. COLE: They are objected to as not being material to the facts in this case. I suppose they had better go into the record, but we raise this objection in order that we may not appear to admit their materiality.

The COURT: Objection overruled, evidence admitted, exception noted for plaintiff and bill sealed."

139 Defendant's Exhibit "A" in full (printed on page 57*a* et seq. of Exhibit "A" hereto attached).

Excerpt from defendant's Exhibit "C," beginning on page 81*a* with the words "Orders. At a General Sessions of the Interstate Commerce Commission," etc., and ending on page 92*a* with the paragraph "And it is further ordered, That the question of damages claimed by the complainants in these proceedings in respect to the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

Excerpt from defendant's Exhibit "C," beginning on page 91*a* of Exhibit "A" hereto attached with the words "Copy of Defendant's Exhibit 'D,'" and extending to the words on page 98*a* of Exhibit "A" hereto attached "It may be well, however," etc., found on the third to the last line on the said page: and beginning again on page 102*a* of Exhibit "A" hereto attached with the paragraph "We come now to the practice of the defendant," etc., and extending to the paragraph on page 107*a* of Exhibit "A" hereto attached, beginning "In view of our finding herein that the practice," etc. Also a third excerpt from Exhibit "A" beginning on page 144*a* of Exhibit "A" hereto attached with the words "Order. At a General Session of the Interstate Commerce Commission," etc., and ending with and including the last paragraph on page 145*a*.

Exhibit "E" entire (printed on page 146*a et seq.* of Exhibit "A" hereto attached).

Excerpt from Defendant's Exhibit "F," beginning on page 183*a* of Exhibit "A" hereto attached with the words "Order. At a General Sessions of the Interstate Commerce Commission," etc., down to and including the remaining portion of Exhibit "F" as far as to Exhibit "G."

Excerpt from Defendant's Exhibit "G," beginning on page 203*a* of Exhibit "A" hereto attached with the words "Order. At a General Session of the Interstate Commerce Commission," etc., down to and including the remaining portion of Exhibit "G" as far as to the words on page 204*a* "It is agreed between Counsel," etc.

9. Agreement of Counsel (printed on pages 204*a* and 205*a* of Exhibit "A" hereto attached).

10. Charge of the Trial Court (printed on page 7 of the Appellant's Paper Book filed in this case in the Supreme Court of Pennsylvania, a copy of which is hereto attached and marked Exhibit "B."

11. Defendant's points (printed on page 8 of Exhibit "B" hereto attached).

12. Verdict of the Jury and judgment thereon (printed on page 9 of Exhibit "B" hereto attached).

13. Defendant's motion for judgment non obstante verdicto (printed on page 238*a* of Exhibit "A" hereto attached).

14. Defendant's motion in arrest of judgment and for new trial (printed on pages 238a and 239*a* of Exhibit "A" hereto attached).

15. Opinion of Trial Court discharging said motion (printed on page 239*a* et seq. of Exhibit "A" hereto attached).

140 16. Decree of Trial Court sur said motion (printed on page 249*a* of Exhibit "A" hereto attached).

17. Assignments of Error in the Supreme Court of Pennsylvania (printed on pages 9 and 10 of Exhibit "B" hereto attached).

18. Opinion of Supreme Court of Pennsylvania affirming the judgment of the Court below.

19. Petition filed by the plaintiff in error with the Honorable D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, praying for the allowance of a writ of error from the Supreme Court of Pennsylvania to the Supreme Court of the United States.

20. Action of the Honorable D. Newlin Fell, Chief Justice, allowing the writ of error.

21. Writ of error on appeal to the United States Supreme Court.

22. Specifications of error filed by the plaintiff in error.

FRANCIS I. GOWEN,
Attorney for the Plaintiff in Error.

141 COMMONWEALTH OF PENNSYLVANIA,
County of Clearfield, ss:

On this 23rd day of September, in the year of our Lord, one thousand nine hundred and thirteen, before me, the undersigned Prothonotary of the Court of Common Pleas of said County personally appeared Jas. P. O'Laughlin, who being duly sworn according to law doth depose and say that he served a copy of

foregoing Præcipe upon Alfred M. Liveright, of the attorneys of record for the said Stineman Coal Mining Company, the defendant in error, plaintiff below, by handing him a true and correct copy of the said Præcipe and of the exhibits thereto attached, on the 23rd day of September, A. D. 1913.

JAS. P. O'LAUGHLIN.

Sworn to and subscribed before me this 23rd day of September, 1913.

[Seal Court of Common Pleas, Clearfield County, Pa.]

JOHN H. MOORE, *Proth'y*

142 STATE OF PENNSYLVANIA,
Eastern District:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true and correct copy of the Record, so full and entire as is indicated by the attached præcipe.

In tesimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 11th day of October, A. D. 1913.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

143 I, D. Newlin Fell Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, that Alfred B. Allen, was, at the time of signing the annexed attestation, and now is, Deputy Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 11th day of October one thousand nine hundred and —.

D. NEWLIN FELL.

I, Alfred B. Allen Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, that the Honorable D. Newlin Fell by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 11th day of October one thousand nine hundred and thirteen.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

1 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

To the Honorable John P. Elkin, Justice of the Supreme Court of Pennsylvania:

15th November, 1913, come A. L. Cole and A. M. Liveright, Attorneys for the Stineman Coal Mining Company, defendant in error in the above stated case, and respectfully aver that the plaintiff in error, the Pennsylvania Railroad Company, on September 23, 1913 served a copy of the præcipe directed to the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania, indicating the portions of the record it wanted incorporated in the transcript of the record upon writ of error; that it was impracticable within 10 days thereafter to prepare and lodge with the Prothonotary of the Supreme Court of Pennsylvania the counter præcipe of the defendant in error; that by inadvertence, counsel for the defendant in error failed within 10 days of service upon them of the præcipe of the plaintiff in error, to obtain an order from the Supreme Court of Pennsylvania enlarging the time for them to file their counter præcipe.

Petitioners aver that it is provided by Section 1 of Rule 10 of the United States Supreme Court that the time for filing such counter præcipe may be enlarged by a Judge of the Court whose decision is made the subject of review, or by a justice of

2 the United States Supreme Court.

Petitioners further aver that it is important for a proper consideration of the case upon review by the United States Supreme Court that additional portions of the record be incorporated in the transcript of record to be submitted to the Appellate Court.

They therefore respectfully pray your Honor now to make an order enlarging the time for filing their præcipe until the 6th day of December, 1913.

And they will ever pray.

A. L. COLE.
A. M. LIVERIGHT.

STATE OF PENNSYLVANIA,
County of Clearfield, ss:

A. M. Liveright, one of the petitioners, being duly sworn according to law, deposes and says that the matters in the foregoing petition averred are true and correct to the best of his knowledge, information and belief.

A. M. LIVERIGHT.

Subscribed and sworn to before me this 15 day of November, 1913.

[SEAL.] JAMES K. HORTON,
Notary Public.

My commission expires March 14, 1915.

3 *Order of Court.*

And now 17th day of November, 1913, the foregoing petition of A. L. Cole and A. M. Liveright, Attorneys for the Stineman Coal Mining Company, presented, read and considered, and thereupon it is ordered that the time for filing with the Prothonotary of the Supreme Court of Pennsylvania, the præcipe of said named defendant in error, indicating the additional portions of the record desired by it to be incorporated into the transcript of the record to be filed in the United States Supreme Court, be enlarged to December 6, 1913; and it is further ordered that the additional portions of the record that may be designated by the defendant in error pursuant to leave hereby granted shall be transmitted to the United States Supreme Court as a part of the transcript of the record and be therein incorporated.

JNO. P. ELKIN,
Justice of Supreme Court.

4 Endorsement: In the Supreme Court of Pennsylvania, Eastern District. No. 53. January Term, 1913. Stineman Coal Mining Company vs. Pennsylvania Railroad Company. Petition in re record on writ of error to United States Supreme Court. Presented in Chambers Nov. 17, 1913, and within order made. Jno. P. Elkin, Justice of Supreme Court. Filed Nov. 26, 1913, in Supreme Court. A. L. Cole, A. M. Liveright, Attorneys at Law, Clearfield, Pa.

5 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1913.

No. 53.

STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Præcipe of Defendant in Error, Indicating Additional Portions of the Record to be Incorporated into the Transcript of the Record on Writ of Error.

To the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania:

In addition to the portions of the record called for by the plaintiff in error, you are respectfully requested to incorporate into the tran-

script of the record to be certified to the Supreme Court of the United States, and there file in connection with the writ of error heretofore sued out in the Supreme Court of Pennsylvania to the said Supreme Court of the United States in the above entitled case, the following portions of the record.

A. L. COLE,
A. M. LIVERIGHT,
Att'ys for Defendant in Error.

(1) Testimony of W. I. Stineman, pages 2*a* to 25*a* inclusive in Exhibit "A" attached to præcipe of plaintiff in error.

(2) Testimony of John Scott, Jr., pages 25*a* to 29*a* inclusive, in the said Exhibit.

(3) Testimony of George E. Scott, page 33*a* to cross-examination at page 41*a* of the same Exhibit, inclusive.

(4) Letters, beginning at the foot of page 29*a* with the words "December 1, 1902, M. Trump, Esq." and continuing through pages 29*a*, 30*a*, 31*a*, 32*a*, and 33*a* of the same Exhibit to the testimony of George E. Scott.

(5) Excerpt from the testimony of George W. Clark, beginning with "Did you know during that period of special orders being issued for the Berwind-White Coal Mining Company?" at page 53*a*, to the words "When it was possible they were carried out" at top of page 54*a* of the same Exhibit.

6 (6) Statement by Mr. Cole on page 54*a* of the same Exhibit, reading "I think under our arrangement that is our case, since we have agreed on the amount of the verdict. Now the defendant can put on the record anything they want."

(7) Excerpt from the defendant's Exhibit "D" in said Exhibit "A" beginning with the paragraph opening "The complainant alleges that the system" at the fifth line at the foot of page 121*a*, and concluding with the words "Must have accrued" at the middle of page 122*a*.

Endorsement: No. 53 January Term, 1913—In the Supreme Court of Pennsylvania, Eastern District—Stineman Coal Mining Company vs. Pennsylvania Railroad Company, Appellant—Præcipe of defendant in error—Filed Nov. 26, 1913 in Supreme Court—A. L. Cole, A. M. Liveright, Attorneys at Law, Clearfield, Penna.

7 W. I. STINEMAN, called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. Where do you live?
A. South Fork, Cambria County.
Q. How long have you lived there?
A. Some forty odd years.
Q. All your life practically?
A. Yes, sir; born and raised there.
Q. What is your business?

A. I am manager of the Stineman interests at South Fork.
Q. How long have you held that position?
A. Twenty-three years.
Q. What do you mean by Stineman interests?
A. I mean the Stineman Coal Mining Company and the Stineman Coal & Coke Company Mines.
Q. This action is brought by the Stineman Coal Mining Company. Were you in 1902, 1903 and 1904 connected with that?
A. Yes, sir.
Q. In what capacity?
A. As manager.
Q. Did you manage their coal operations?
A. Yes, sir.
Q. At that time were you also connected with the Stineman Coal & Coke Company?
A. Yes sir.
Q. In what capacity?
A. As manager.
Q. You say you held this position for twenty-three years?
A. About twenty-three years; yes, sir.
Q. Has it always been the same character of position?
A. Practically so.
8 Q. What is the business of the Stineman Coal Mining Company?
A. To mine and ship coal to the market, as I understand it.
Q. And of the Stineman Coal & Coke Company?
A. The same.
Q. Where are the mines of the Coal Company situated?
A. They are all located at South Fork.
Q. In interrogating you I shall designate the Stineman Coal Mining Company as the Coal Company, and the Stineman Coal & Coke Company as the Coke Company, for brevity. Where are the mines of the Coal Company with reference to the main line of the Pennsylvania Railroad?
A. The side track leading to all those mines come- off the yard of the South Fork Railroad and I would judge about 2,500 to 3,000 feet from the yard the mines are located.
Q. The South Fork Railroad is a branch of what?
A. The Pennsylvania.
Q. Where does it connect with the Pennsylvania?
A. At South Fork.

By the COURT:

Q. Then your sidings come off the South Fork branch?
A. They come off the yard of the South Fork branch, what is commonly known as the north end of the South Fork yards.
Q. Your siding is not on the main line?
A. They are not off the main line. I believe their tonnage is credited to the Mountain Division, not to the South Fork Railroad.

9 By Mr. LIVERIGHT:

Q. You say you are a part of the Mountain Division of the Pennsylvania Railroad?
A. That is what I understand.
Q. From whom?
A. From the car distributor.
Q. Of the Pennsylvania Railroad?
A. Yes sir.

The COURT: Those are not operating divisions, are they, of the railroad?
Mr. COLE: They are just subdivisions for distribution purposes.

The COURT: That is what I understand, they are simply subdivisions for car distributing purposes but not operating divisions of the Pennsylvania Railroad.
Mr. LIVERIGHT: Subdivisions for car purposes of the defendant Company.

A. These tracks were originally connected with the main line of the Pennsylvania Railroad. When the South Fork Railroad was put in *their* [there] for their convenience the tracks were changed and connected to the yard of the South Fork Railroad.
Q. Where are the mines of the Berwind-White Coal Mining Company?
A. They are located on the Scalp Level branch of the South Fork Railroad.
Q. Where do they lie with reference to your mines?
A. Lay south of the Stineman interests.
Q. How far?
A. Probably about 10 to 12 miles.
Q. Of what division are they a part?
A. They are part of the Scalp Level Railroad or South Fork.
10 Q. Is that a different car distribution division than yours?
A. I can't say. I don't know about that.
Q. You do know they are part of the Scalp Level?
A. I do know they are located on the South Fork Railroad.
Q. What rate to market do these two sets of mines take?
A. What is that?
Q. What rate to market does the coal of these two sets of mines take, the Berwind-White and Stineman?
A. They take the same freight rate, I understand.
Q. How do they compare with each other in general characteristics as to coal accessibility and other features?
A. The mines are working the same seam, which is commonly known as the Miller or B vein of coal, the Scalp Level mines and the South Fork mines.
Q. Will you take the pointer, Mr. Stineman, and point out for the benefit of the jury on this schedule in front of you the location of the various properties?
A. This extension here runs up into what is known as the Wind-

ber or Scalp Level field. This line coming in here comes off the main line of the Pennsylvania Railroad. These are the Stineman tracks going up in here to the common yards. This is the tipple of the Stineman Coal Mining Company. The empty cars are placed here, 5300, placed in the common yard, and this is Stineman No. 1, here going to No. 3, dropped down to this tipple at No. 1, loaded and dropped below the tipple and taken out to the South Fork yard. This is probably, I would say, about a thousand feet from the main line in here where this side track switches off from the yard of the South Fork Railroad.

Q. How far distant is the Coke Company tipple from the Coal Company?

11 A. I would say 600 feet its No. 2, and its No. 4 practically about 1200 feet. That, of course, can be gotten accurate by taking the scale of the blue print.

Q. What do you call the tipple of the Coal Company?

A. No. 1.

Q. You say cars for all these Stinemans were shoved up the tail track and fed by gravity to the various tipples?

A. Yes sir.

By the COURT:

Q. Is Scalp Level on up that way?

A. No, this is an extension of the South Fork Branch going up here, going up South Fork Creek.

By Mr. LIVERIGHT:

Q. When was the Stineman Coal Mining Company incorporated?

A. January 1st, 1901, it went into business.

Q. Prior to that time had you been in business with your brothers and associates?

A. Yes sir.

Q. Where?

A. At South Fork.

Q. On what property?

A. On the property which was the Stineman Coal & Coke Company lease.

Q. The Stineman Coal & Coke Company lease?

A. Yes sir.

Q. What acreage did that constitute?

A. That originally was about a thousand acres under that lease.

Q. What business did you do for the Coal & Coke Company?

A. We had the contract of placing that coal on the cars at so much a ton.

12 Q. That is Stineman Brothers had?

A. Yes, Stineman Brothers had from some time in 1897 up until 1901.

Q. Who owned the improvements?

A. The Stineman Coal & Coke Company. We purchased those from the Stineman Coal & Coke Company.

Q. Who do you mean by we?

A. Stineman Brothers.

Q. What became of the interests of Stineman Brothers in those improvements?

A. Sold to the Stineman Coal Mining Company.

Q. When was that done?

A. About January 1st, 1901.

Q. Was there any change made in reference to the lease held by the Stineman Coal & Coke Company or did that continue in force?

A. No change. That continued in force and is in force today.

Q. Now what became of the contract of the Stineman Brothers to load coal on the cars for the Stineman Coal & Coke Company?

A. That was assumed by the Stineman Coal Mining Company on January 1st, 1901.

Q. You say it was assumed. Was it carried out?

A. Yes sir.

Q. What kind of cars were loaded by the Stineman Coal Mining Company out of the coal owned or leased by the Stineman Coal & Coke Company?

A. They were cars furnished by the Sterling Coal Company, assigned to the Stineman Coal & Coke Company. The Stineman Coal Mining Company removed the coal from the lease of the Coal & Coke Company and was supposed to load it in the cars furnished by the Sterling Coal Company to the Stineman Coal & Coke Company.

Q. Did the Stineman Coal Mining Company have anything to do with obtaining the cars on which this coal was placed?

13 A. The Stineman Coal Mining Company relied entirely upon the Pennsylvania Railroad system cars. No other source of supply.

Q. Answer the question please. Did the Stineman Coal Mining Company have anything to do with the arrangement or contract for the cars to be loaded for the Sterling Company?

A. No sir.

Q. Between what parties were those arrangements made?

A. Between the Stineman Coal & Coke Company and the Sterling people.

Q. How did those cars come in?

A. They were assigned to the Stineman Coal & Coke Company's mines.

Q. By whom?

A. By the Sterling Coal Company.

Q. Where was the Sterling Coal Company situated?

A. Philadelphia.

Q. What classes or characters of cars were these that were loaded for the Sterling Company?

A. Cornwall & Lebanon cars.

Q. Any other class?

A. No, I think not at that time. I don't know whether they sent in their Sterling cars or not, Sterling individual, I am not sure.

Q. Did those C. & L. cars come into the same yards as the cars intended for your operation?

A. Yes sir.
Q. Were they shoved up on the same tail track?
A. Yes sir.
Q. And how did they reach the tipple of the operating company?
A. They were dropped by gravity into the different tipples to the different mines.
Q. What was the arrangement between Stineman Coal Mining Company and the Stineman Coal & Coke Company with
14 reference to the loading of these consigned cars?
A. Not any arrangements. The Coal & Coke Company loaded their coal into the C. & L. cars or Sterling cars as we know them.
Q. You didn't load them for them free of charge, did you?
A. No sir, we did not.
Q. Give the arrangement, please?
A. The Stineman Coal Mining Company on the coal they mined from the lease of the Coal & Coke Company was loaded in the Sterling cars at a contract price.
A. I think it was 80 cents a ton, if I remember rightly, at that time. It varied on sliding scale prices.
Q. Did the Stineman Coal Mining Company have any interest whatever in the sale of the coal that was loaded in the C. & L. cars for the Coal & Coke Company?
A. Nothing at all.
Q. Did it have any interest in them beyond the receipt by it for the contract price for loading?
A. No.
Q. How long was that contract price maintained?
A. I can't recall that.
Q. Was it changed at any time?
A. The contract was on a basis of the miners' wages, rise and fall. In other words, a sliding scale.
Q. That is, if the wage scale increased, the price for loading the coal increased?
A. Yes sir.
Q. And vis*a* versa?
A. Yes sir.
Q. Did all the coal for loading of the C. & L. cars come out of coal territory not owned or leased by the Stineman Coal Mining Company?
A. It came from the lease of the Stineman Coal & Coke Company.
15 Q. Was that ever transferred or taken over in any way by the Stineman Coal Mining Company?
A. You mean the leasehold?
Q. The leasehold?
A. Oh no.
Q. Over what improvements was this coal loaded for market?
A. Over the improvements of the Stineman Coal Mining Company.

Q. State whether or not the contract price of 80 cents a ton covered the use of the improvements as well as of loading?

A. Yes sir.

Q. What territory did the Stineman Coal Mining Company have under control?

A. They had about 1200 acres, lying west of the lease of the Stineman Coal & Coke Company.

Q. From whom did they lease?

A. They leased that from J. C. Stineman.

Q. When?

A. In 1901, January 1st.

Q. What kind of coal was that?

A. Miller or bed B as it is commonly known.

Q. State whether or not the coal is persistent in that acreage?

A. It is.

Q. What is the height of it?

A. It runs from 3 feet 6 to 4 feet.

Q. State whether or not it is out of that lease that the coal loaded between 1902 and 1905 by the Coal Company came?

A. It is out of that lease. Lease made to the Stineman Coal Mining Company.

Q. What equipment did the Coal Company have at its mines with which to operate?

A. They were equipped with electricity and rope haulage.

Mr. LIVERIGHT: It is agreed by Counsel for plaintiff and
16 defendant that the coal operation of the Stineman Coal Mining Company was so equipped that during the period of the action it could have mined its rating as fixed by the defendant company.

Mr. GOWEN: Subject, of course, to the ordinary minor interruptions.

By Mr. LIVERIGHT:

Q. What was the rating of your mine?

A. 33 cars a day I believe.

Q. How many tons was that?

A. It depended entirely on the kind of cars supplied. The mine at that time had a capacity of from 1000 to 1100 tons a day, which I think was a 10 hour work day at that time.

Q. In 1902, in the month of April, when this action begins, what was the physical capacity or output of your mine with reference to the Stineman Coal Mining Company leasehold?

A. In 1902?

Q. Yes?

A. It ran about 8000 tons a month.

Q. That was the output?

A. That was the output from the lease of the Stineman Coal Mining Company.

Q. What was its productive ability at that time per diem?

A. On April 1st, not any greater than that.

Q. On July 1st, 1902, what was its productive capacity, not its output?

A. Its productive capacity, about 9000 tons.

Q. On September 1st what was its productive ability?

A. In the natural course of events I would say 10,000 tons the month, natural increase of tonnage.

17 Q. I don't mean the natural increase in output but its productive ability?

A. I mean its productive ability was from 10 to 11000 tons in September.

Q. September, 1902?

A. Yes sir.

Q. In the spring of 1903 what was its productive ability?

A. Practically about the same tonnage.

Q. 10 or 11000?

A. Yes, 10 or 11000 tons.

Q. Is that productive ability entirely apart from what was or could be produced on the Stineman Coal & Coke Company lease?

A. That is entirely apart from the Stineman Coal & Coke Company lease.

Q. What was the productive capacity of that property?

A. It ran from about 10 to 11000 tons a month, making a total tonnage of about 20,000 tons.

Q. What kind of cars did you load at the tipple there out of the Coal Company's lease?

A. Pennsylvania cars when we got them.

Q. Is that what is known as system cars?

A. Yes sir.

Q. State whether or not under the rules then in force by the railroad company private cars were counted against distribution?

Mr. GOWEN: I object to the question. The rules are the best evidence, as Counsel knows.

Mr. LIVERIGHT: Counsel knows there were no rules printed or promulgated in that time, 1902.

Mr. GOWEN: That is right, there were no rules.

. I understood private cars were not counted against your distribution.

18 By Mr. LIVERIGHT:

Q. From whom did you so understand?

A. Understood it from the railroad people.

Q. Who do you mean by the railroad people?

A. I mean the car distributor, which was the assistant car despatcher at Altoona.

Q. Name these people?

A. Mr. D. Steele was assistant train despatcher at that time.

Q. Did you get that information from any other railroad sources?

A. No sir.

Q. Just Mr. Steele?

A. Yes sir.

Q. State whether you know as a fact that system you have just described prevailed at this time in your vicinity?
A. It did.
Q. How long did that system continue, if you know?
A. I think that continued up until just a few years ago, as far as the Stineman mines are concerned.
Q. That is up until a few years ago private cars were not counted against distribution?
A. Private cars were not counted against the company that owned the plants.

By Mr. GOWEN:

Q. You said were not counted against the companies that owned the plant?
A. Yes sir.

By Mr. LIVERIGHT:

Q. During all that time your company owned the plant?
A. That is the Stineman Coal Mining Company, they owned the plant.
19 Q. Was there any change during this action with reference to the method adopted in mining the Coke Company's coal?

Mr. O'LAUGHLIN: We object to it. What the Coke Company has to do with this we don't know.

By Mr. LIVERIGHT:

Q. During the entire period of this action did the coal of the Coke Company lease continue to be loaded over your tipple?
A. I find that on March, 1903, the Coal & Coke Company took over their own acreage and mined their own coal.

By the COURT:

Q. So that after March, 1903, you were not loading anything from the Coal & Coke Company lease over the tipple of the Coal Mining Company. Is that what you mean?
A. That is what I mean.

By Mr. LIVERIGHT:

Q. I understand you, Mr. Stineman, to say beginning in March, 1903, physically the coal was loaded on another tipple or that the Coke Company then assumed its own pay roll?
A. The Coke Company assumed its own pay roll on March 1st, 1903, and on November 1st, 1903, they loaded their coal on their own equipment, their own tipple.
Q. At another location?
A. Another location. The plants were separated.
Q. On that date there was a complete divorce between the two companies?
A. Yes sir, a complete divorce.

Q. Up until March, 1903, did the Coal Company pay the pay roll of the Coke Company?

20 A. I understand so, yes sir, up until March, 1903 the Coal Mining Company paid the pay rolls of the Coal & Coke Company for the coal which came out of their lease.

By Mr. COLE:

Q. They paid all the expenses; they mined the coal and paid the pay roll and everything else?

A. Yes sir.

By Mr. LIVERIGHT:

Q. How did you get Pennsylvania cars for loading at the Coal Company's operation?

A. By making a demand for them every evening for the supply the next day.

Q. Where did you make that?

A. That demand was made to the assistant train master at Altoona.

Q. How?

A. By telegram or telephone or by furnishing it to their operator at South Fork.

Q. Do you mean by furnishing it to the Railroad Company's operator?

A. Yes sir.

Q. Did you file the demand with him?

A. Always filed the demand with the operator or telephoned it to the office at Altoona.

Q. How frequently was this demand made?

A. That demand was made every afternoon or evening for the supply on the following day.

Q. Who made it?

A. I did.

Q. Did you specify what kind of cars you wanted for the Coal Company?

A. Always specified the cars for the different mines.

Q. Can you tell how many you ordered day by day?

21 A. I cannot. That is too far back.

Q. With references to your capacity to load coal, how many did you order, more or less than that?

A. It was customary among the coal men to order about any wheres *for* 40 to 50 per cent more than they needed. They ordered a much larger amount probably than what they would load each day.

Q. Why was that?

A. Probably thought they would stand a better chance in getting cars or more of them.

Q. Did you get cars up to the requirements of your mine.

A. Did not.

Q. If you had gotten cars up to your rating, could you have loaded them?

A. Yes sir.
Q. Your rating was 33 cars a day?
A. Yes sir.
Q. Did you order that many?
A. I ordered more than 33. I think the records will show that.
Q. Do you know anything about the supply of cars that went up to the Berwind mines during the period of this action?
A. I do not.
Q. Did you know of any orders issued in their favor in the way of cars?
A. Only hearsay.
Q. From whom did you hear it?
A. That I can't say. That was common rumor among coal men that they were receiving special favors.
Q. Of your own knowledge you don't know what happened?
A. Of my own knowledge I do not.
Q. State whether or not you saw cars going to the Berwind mines apast your switch?
A. I did.
22 Q. With what frequency?
A. They seemed to have full supply. I seen them quite often being hauled over our own switches.
Q. Did you ever take up the question of cars for the Coal Company with any one representing the Railroad Company?
A. I might say that we took up most every day.
Q. With whom?
A. With the car distributor at Altoona or train despatcher.
Q. In what way did you take it up?
A. By simply talking to him over the telephone and telegrams.
Q. What do you mean by taking it up?
A. Took up the question whether they couldn't help us out. Demanded cars because our neighbors were receiving a full supply.
Q. Were you receiving a full supply?
A. No sir.
Q. State whether or not you brought that to the attention of anyone for the defendant?
A. Yes sir.
Q. To whose attention?
A. Brought to the attention of the train despatcher.
Q. What was his name?
A. Mr. Steele.
Q. Wasn't he assistant train master?
A. Assistant train master. I think it was brought to the attention of Mr. Creighton, General Superintendent, also brought to the attention of Mr. Trump.
Q. Who is Mr. Trump?
A. I can't recall his official capacity.
Q. Where was he located?
A. Philadelphia, Broad Street Station.
Q. How did you bring it to his attention?
A. It was brought to his attention by myself and the President of the Company, Mr. Whitely.

23 Q. By personal interview?
A. Personal interview.
Q. When did this occur?
A. Sometime in 1903, I believe. I can't recall the date that interview took place.
Q. What was the nature of the interview?
A. Mr. Whitely, as President of the Company, made a demand for a supply of cars for his mine and owing to the Berwind-White people receiving special assignments or full supply of cars, and he was informed in my presence that they intended keeping the Berwind mines supplied with cars regardless of any other shipper.
Q. Who informed him?
A. Mr. Trump.
Q. How long did this interview last?
A. I can hardly recall that. Mr. Whitely objected to that and Mr. Trump said we should sue. Mr. Whitely said that was his own prerogative.
Q. You said Mr. Trump suggested you sue?
A. Mr. Trump suggested we sue.
Q. This was as far back as 1903?
A. Yes sir.
Q. Did you have any other interview with Mr. Trump?
A. No sir.
Q. Or any other operating official at Broad Street Station?
A. No sir.
Q. All your other demands or requests were preferred at Altoona or locally?
A. Yes sir.
Q. Did you get an improvement in car service through these intercessions?
A. Not to my knowledge. I don't remember we did, or we wouldn't be here.
Q. Did you have an interview with Mr. Creighton on the same subject?
24 A. I think not.
Q. How did you take the matter up with him?
A. I think through telegrams. Telegrams passed between the Company and Mr. Creighton.
Q. What quality of coal was mined at the Coal Company's plant?
A. You mean the geological description of it?
Q. Yes.
A. We mine the Miller seam or the B, as commonly known, bed B.
Q. Was it a low grade coal?
A. Very high grade we think.
Q. About how many operators in that neighborhood have that quality of coal?
A. You mean right in the vicinity of South Fork?
Q. Yes.
A. About four. Four or five.
Q. What is the trade name of these coals?

A. Miller.
Q. Did you have any trade for it?
A. We can sell all the coal we can mine at the Stineman mines and always have been able to sell it.
Q. That condition obtained in 1902, 1903 and 1904?
A. That condition has obtained for twenty years or over, ever since it was a mine opened.
Q. Then your sales and output of coal are limited by what factors only?
A. By capacity.
Q. Capacity and what else?
A. Ask that question again.
Q. I say your ability to load, produce and sell coal are limited by what factors?
A. By the capacity of the mine and conditions.
Q. How about the car supply?
A. And the car supply, of course.
Q. Mr. Stineman, is any of your coal under contract?
A. I am unable to say that, as I have nothing to do only with the producing end. Nothing to do with the selling end of the business.
Q. Who sold it?
A. Sold through Mr. Scott, representing the Mining Company at Philadelphia.
Q. Which Scott?
A. Mr. George E. Scott.
Q. Do you know whether there were demands for your coal during this time that were unfilled?
A. I think I answered that question.
Q. Were there demands on you by the representatives to get out more coal?
A. Yes, that is practically all the time.

Cross-examination.

By Mr. GOWEN:

Q. Mr. Stineman, dealing now with the period before March, 1903, was the Stineman Coal & Coke Company then or had the Stineman Coal & Coke Company any tipple over which its coal was shipped?
A. Prior to March, 1902, they had an operation known as No. 2.
Q. No, March, 1903?
A. 1903 also a property known as No. 3. No. 2 I mean.
Q. The Stineman Coal & Coke Company No. 2?
A. Yes sir.
Q. Had the Stineman Coal Mining Company any relation whatever to coal which was shipped from that operation, the Stineman Coal & Coke Company No. 2?
A. No.
Q. Then do I understand that before March, 1903, all the coal which was mined by the Stineman Coal Mining Company for the

Stineman Coal & Coke Company was loaded over the tipple of the Stineman Coal Mining Company?

26 A. Not the lease of which No. 2 mine is located is entirely separate than the leasehold of the Stineman Coal & Coke Company, the coal which passed over the equipment of the Coal Mining Company. There is two leases of the Stineman Coal & Coke Company.

Q. But my question was, whether all the coal of the Stineman Coal & Coke Company which the Stineman Coal Mining Company mined for and loaded on to cars was delivered to cars over the tipple of the Stineman Coal Mining Company?

A. Yes sir.

Q. Now how long did that condition continue?

A. That continued up until November 1st, 1903.

Q. Until November 1st, 1903?

A. Yes sir.

Q. Now let us have no mistake about that. All the coal which you have testified to as mined by the Stineman Coal Mining Company for account of the Stineman Coal & Coke Company came through the improvements or opening of the Stineman Coal Mining Company No. 1, was loaded over its tipple in cars placed at that tipple. Is that right?

A. All the coal that came from the Stineman Coal & Coke Company lease was loaded over the tipple or the improvements of the Stineman Coal Mining Company up until November 1st, 1903. That is your question.

Q. Then all the cars which had been referred to as belonging to the Sterling Coal Company, which you say were loaded with coal of the Stineman Coal & Coke Company, were loaded with that coal at the Stineman Coal Mining Company No. 1 tipple?

A. I understand that question, that all the cars that the Sterling Coal Company——

Q. I am speaking prior to November 1903?

A. All the cars assigned to the Sterling Coal Company?

27 Q. All the cars of the Sterling Coal Company which you referred to in your testimony in chief, which were loaded by the Stineman Coal Mining Company with coal of the Stineman Coal & Coke Company were loaded at the Stineman Coal Mining Company operation No. 1

A. That is the way I understand it, Mr. Gowen.

Q. Mr. Stineman, you are not an officer of the Sterling Company?

A. I am not.

Q. You were not during this period?

A. At any time.

Q. What information have you except hearsay as to the assignment of those cars of the Sterling Coal Company?

A. As director of the Stineman Coal & Coke Company and as their manager, knowing the cars were assigned.

Q. What action was had by the directors of the Stineman Coal & Coke Company on that subject?

A. I can hardly recall the arrangements that existed between the Stineman Coal & Coke Company and Sterling Company.

Q. What arrangement was there between them?

A. Nothing more than what is referred to in the contract between the Stineman Coal & Coke Company and the Sterling Company, in which they agree to furnish the cars.

Q. Have you a copy of that contract?

A. I believe I have.

Q. Will you let me see it?

(Witness produces contract.)

Q. Now, Mr. Stineman, referring again to the manner in which the coal mined from the Coal & Coke Company's leasehold on its account by the Stineman Coal Mining Company was shipped, my understanding is that the leasehold of the two companies adjoin?

A. Yes sir.

Q. That the underground working of the Stineman Coal Mining Company No. 1 operation reached the coal in the Stineman Coal & Coke Company lease?

A. Yes.

28 Q. And that that coal was mined from that leasehold and was transported underground through the Stineman Coal Mining Company's mine and was shipped over its tipple?

A. Yes sir.

Q. Now, after November, 1903, what change occurred?

A. The lease of the Stineman Coal & Coke Company was taken on to the improvement known as the Stineman Coal & Coke Company No. 4. They separated the operation. The coal that was under the lease of the Stineman Coal & Coke Company was then loaded at Stineman No. 4.

Q. So that after November, 1903, the coal from Stineman Coal & Coke Company lease which theretofore had been transported or carried underground to the Stineman Coal Mining Company's operation and shipped over its tipple came out over another tipple?

A. Yes, loaded at No. 4 tipple.

Q. Belonging to the Stineman Coal & Coke Company?

A. Belonging to the Stineman Coal & Coke Company.

Q. Then after that date, after November, 1903, the only coal which was loaded over the tipple of Stineman Coal Mining Company was its own coal?

A. Was out of their own lease, Mr. Gowen.

Q. Mr. Stineman, you were asked as to your ability to ship during the period of the action the output of your mine. Have you got any figures with you showing the actual shipments made over the Stineman Coal Mining Company's No. 1 tipple?

A. I have, yes, sir.

Q. Throughout the period of the action?

A. That is what I am referring to here.

Q. Does that include all coal whether belonging to the Coal & Coke Company or the Mining Company?

A. Yes.

29 Q. Will you give us those figures?

Mr. COLE: I don't think this is cross-examination of this witness. I don't think he is required under his direct examination to make a table of that character for them.

Mr. GOWEN: I am not asking him to make a table, I am asking for figures.

Mr. COLE: It is objected to as not cross-examination.

The COURT: I think we will sustain the objection, note exception for defendant and seal bill.

Mr. GOWEN: That is all for the present.

By Mr. LIVERIGHT:

Q. Mr. Stineman, was there more than one siding or switch into these several operations from the railroad company's tracks?

A. Just the one switch.

Q. How was it designated by number?

A. I think it is No. 5300. I am not so sure about that during 1902 and 3 or the period of this action.

Q. Did that designation apply equally to the Stineman Coal Mining Company's operation and Stineman Coal & Coke Company's operation?

A. I couldn't say. I don't know what they do.

Q. Do you know of any more than one siding number?

A. I do not.

Q. Was there a Stineman Coal & Coke Company No. 1 operation so-called?

A. Not that I know of. Prior to 1901, January 1st, probably this mine of the Stineman Coal Mining Company was designated the Stineman Coal & Coke Company No. 1. I don't remember that.

30 Q. That is prior to the incorporation of the Stineman Coal Mining Company?

A. Yes, the sale to the Stineman Coal Mining Company.

31 JOHN SCOTT, JR., called on part of plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. What is your profession?

A. Attorney at law.

Q. Where do you live?

A. Philadelphia.

Q. Were you attorney for the Stineman Coal Mining Company in 1902, 1903 and 1904?

A. I organized the Stineman Coal Mining Company and for a time I was the temporary president of it. I was afterwards the attorney for it. I never was a stockholder or interested in it.

Q. In that capacity did you have any correspondence with the officials of the Pennsylvania Railroad Company in relation to the car supply question?

A. Yes sir.

Q. When?

A. On March 3, 1903, I wrote to S. M. Prevost, Third Vice President of the Pennsylvania Railroad, Broad Street Station, complaining about the car situation and the car shortage for the Stineman Coal Mining Company, together with another company, and especially referring to the fact of the special assignments which were at that time, as I was informed, being made to the Berwind-White Company.

Q. Did you get a reply to that letter?

A. Yes sir.

Q. Under what date?

A. Under date of March 7th, 1903, I received this reply from Mr. Prevost. Shall I read it?

32 Q. Yes, read it?

A. Referring to your letter of March 3rd, since its receipt I have made inquiries of Mr. Trump and learn that you have been receiving since January 1st in the neighborhood of 40 per cent more cars than an equitable division of cars available for distribution would really have been given you. The reason for this can be explained by Mr. Trump, and indeed I would be glad if you would call on him and talk to him about all the matters about which you have written to me. Signed by Mr. Prevost.

Q. As a consequence of that letter did you see Mr. Trump?

A. Some week or 10 days later, in company with my brother, George E. Scott, who was connected with the Stineman Company, had charge of their selling department, I went to Broad Street Station and saw Mr. Trump at his office there.

Q. What position did he hold?

A. I think his title was General Superintendent of Transportation.

Q. What was the subject discussed with him?

A. The car supply or rather their lack of car supply.

Q. Can you narrate that conversation now?

A. Well the question of car supply was generally discussed and Mr. Trump told me finally, it didn't make any difference what we or anyone else might think about it that the Pennsylvania Railroad was going to do business in its own way and that was to take care of Berwind and run all chances.

Q. Was Mr. Trump's attention specifically called to these so-called Berwind assignments?

A. The question of special assignments was discussed there and I referred to these assignments. I remember telling him that my information on the subject was from people who had seen the special orders which had been issued to give Berwind 500 cars a day in preference.

33 Q. Is that the special assignments you were talking about in Mr. Trump's office?

A. That was the particular one I spoke of, although I had a list of others. I don't recall that I discussed them specially with him.

Q. State whether it was in response to your calling his attention to these special orders for 500 cars a day that Mr. Trump made the reply that you have given already?

A. Yes, it was. I told Mr. Trump that I thought it was a remarkable statement to be made by a general officer of the Company and asked him if he understood what it meant and what the risks were they were running, and he said he knew what it meant and knew what the risks were and they were going to take them.

We offer the copy of the letter of the witness to S. M. Prevost, dated March 3rd, 1903, the original of which is in the files of the defendant company. Counsel for defendant stipulates there is no objection, if we omit reference to another company in the same letter.

"PHILADELPHIA, March 3rd, 1903.

S. M. Prevost, Esq., Third Vice President, Broad Street Station, Philadelphia.

DEAR SIR: As attorneys for the — Coal Mining Company and the Stineman Coal Mining Company, I am instructed by my clients to call attention to the inequality in the allotment of cars to the operations of these companies, and to make formal demand for such a car supply as we are entitled to receive from your Company in the ordinary and equitable exercise of its function as a common carrier. The Stineman Coal Company, with its operations at South Fork, has a daily capacity of about 1,200 tons. During the year 1902 it mined and shipped from South Fork 212,000 tons. During the month of January, 1902, 18,800 tons. During January, 1903, we were able to ship from this mine only 12,280 tons. The restriction upon the output was from the same cause, lack of cars. The Stineman Coal Mining Company up to and including February
34 27th received at its works during the month of February only 134 cars. It is easily capable of calculation that on this basis the shipments of either Company cannot be much more than half of our shipments of last year. We cannot object of course to a deficient car supply, which is common at the time for any general cause, either to the region or generally in the trade. We do protest and object most seriously, however, to a method of distribution which gives us a reduced car supply, and restricts our output, at a time when the general shipments of bituminous coal over your road, from this region, are larger than ever, and when miners and shippers in our own regions, under similar conditions, and with the same or less capacity, are actually receiving day by day under so-called special assignment a car supply largely in excess of that received by us. We are informed freely at Altoona, by your officials there, that they are obliged out of general car supply to fill a certain number of special assignments, giving fixed numbers of cars daily to special operators and that our own allotment must come out of what is left after these have been filled. It is easily capable of proof that these assignments are made, and that they are filled, and investigation on your part will disclose the fact that someone in authority is adopting this method of distribution rather than the equitable method which would properly apportion among the operators of the region such cars as are available without distinction or discrimination in favor

of any one as against any other one under like conditions. We desire, however, to call your attention [to] the facts as to our own allotment and ask that we receive at your hands the consideration to which we are fairly and legally entitled.

Respectfully yours,

JOHN SCOTT, JR., *Attorney.*"

Q. Did you have any other correspondence or interviews with the executive officers of the Pennsylvania Railroad Company on the same subject?

35 A. I had one or two interviews with Mr. Prevost on the general subject, but whether they were before or after this one I don't recall.

Q. Was the same matter called to his attention?

A. I remember going to Mr. Prevost's office, I can't recall the date, after we had kept tab on deliveries for a month. Mr. Prevost having given express orders—No, that didn't refer to Stineman. That interview did not refer to Stineman I recall now.

Q. Do you recall any other with reference to Stineman?

A. No sir.

Mr. GOWEN: No cross-examination.

36 GEORGE E. SCOTT called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. COLE:

Q. Where do you live?

A. Philadelphia.

Q. What is your business?

A. I am not engaged in business at the present time.

Q. In 1902, '3 and '4 what was your business?

A. I was Philadelphia Manager of the Stineman Coal Mining Company, as well as of another company.

Q. Do you know where that mine was located?

A. Yes sir.

Q. Have you been to the mine?

A. I have.

Q. Who was the superintendent on the ground there that had charge of the operation?

A. W. I. Stineman.

Q. Did you know the relation that existed between the Stineman Coal & Coke Company and the Stineman Coal Mining Company as to loading of coal?

A. I did.

Q. State whether or not the coal that was loaded by the Coal Mining Company for the Coal & Coke Company, as testified by Mr. Stineman, in any way belonged to the Coal Mining Company?

A. It did not.

37 Q. What interest did they have in that transaction, merely the loading price?

A. The Coal Company?
Q. Yes?
A. That is all.
Q. Do you know how the cars that were to be loaded for the Coal & Coke Company were delivered to the mine?
A. The only thing I know is from our agreement in the sale of the Stineman Brothers in regard to the cars that were furnished by the Coke Company. It is specified there. Other than that I know nothing.
Q. Were those cars or were they not consigned to the Coal & Coke Company?

Mr. GOWEN: Mr. Stineman says he knows nothing except what the agreement covers.

By Mr. COLE:

Q. Have you that agreement here?
A. There is a copy of it. I haven't it with me. It is among the papers.

By Mr. GOWEN:

Q. Is it this same agreement referred to by Mr. Stineman, that Mr. Stineman handed me?
A. I couldn't say.

By Mr. COLE:

Q. Without going into it now, what class of cars were delivered to the Coal & Coke Company or delivered for the Coal & Coke Company?
A. What was known as C. & L., Cornwall & Lebanon Railroad cars.
Q. Do you know by whom they were owned or controlled?
A. That I couldn't say. I know who controlled the movement of them.
38 Q. Who did control the movement of them?
A. The Sterling Coal Company.
Q. What quality of coal was this that was produced from the mine?
A. The best. Every man, what he sells is the best. It did stand in the market as the first grade coal on the Pennsylvania road.
Q. State whether or not there was a demand for it in the market?
A. There was decidedly.
Q. To what extent now; to the extent that it was produced or capacity to mine, or what extent was the demand?
A. We never had any difficulty in selling all we produced; could have sold far more.
Q. State if during the period that is covered by this action, from April 1st, 1902 to December 1st, 1904, you could have sold the capacity of that mine?
A. We certainly could.
Q. How did it rank in price with other bituminous coal?
A. As a rule it was higher in price than other coal.

Q. Mr. Scott, was the coal that could have been produced over and above what they did produce, up to its capacity, free coal or what is called spot coal that you had a right to sell in the market during that time, or what it contracted at that price?

A. Well we had quite a number of contracts. Of course, we could only deliver on contracts according to what cars we had.

Q. State whether or not those contracts were filled to the satisfaction of your customers with the coal you did produce?

A. All excepting one or two.

Q. How much was that, how much did that represent?

A. That would represent probably 12 to 14,000 tons.

39 Q. Now the balance of the coal, what could you have done with that if it had been produced?

A. We could have sold it on the market.

Q. At the market price?

A. At the market prices. We would take it to distribute on our contracts. We couldn't get away, if we had additional coal, from taking care of our contracts.

Q. What was the prices for coal, can you tell us, from April, 1902, to December 31st, 1904?

A. I could. I haven't that data with me just at the moment. I will get it. It varied all the time.

Q. Was there a flurry in the coal prices during that period?

A. There certainly was.

Q. Explain to the jury what brought that about, what the conditions were?

A. It occurred in this way, that there was a stoppage of work in the anthracite region from some time about the 20th of May until the 15th or 20th of October.

Q. What year?

A. 1902. Of course, there was no production of anthracite coal and winter coming on it made the demand for fuel and the price went up very high.

Q. What was the range of prices during that time?

A. Anywhere from $1.75 to $7.00.

Q. A ton?

A. A ton at the mine.

Q. Where was this coal sold, at the mines or delivered; where was your market?

A. We had a market in various places. A great deal of it was sold f. o. b. cars at the mines. There was also coal sold at tide water, which would be tide water price.

Q. Could you have sold and would you have sold the capacity of the mines, if you had cars to load it, at the mines during the period of this action?

A. I believe we could, but we never confined ourselves absolutely to one district.

40 Q. Do you *testified* [testify] in your judgment you could have sold that, considering the demand of the coal business during that time?

A. I believe we could.

Q. At the mine. You say you have a schedule of these prices made up?

A. I have them somewhere.

Q. Will you find it, we want to introduce it now. Is it the same as you gave before?

A. It is the same I gave in the Puritan exactly.

Q. Did you make up a statement of the average prices during the period that I called your attention to?

A. I did.

Q. Have you anything before you to refresh your recollection as to what that is?

A. I have my evidence in another case.

Q. Does that refresh your recollection?

A. Yes sir.

Q. Now state what those prices were, beginning with April 1902 down to the close of 1904?

A. This is for the average price of coal outside of contract?

Q. Yes?

A. The average price for April, 1902, was $1.24 per gross ton. For May $1.45. For June $2.40. July $2.19. August $1.73. September $2.07. October $3.73. November $3.25. December $4.24. January, 1903, $4.72. February $2.69. March $1.81. April $1.63. May $1.53. June $1.55. July $1.55. August $1.48. September $1.49. October $1.42. November $1.45. December $1.40. 1904, January $1.35. February $1.31. March $1.34. April $1.31. September $1.17. October $1.18. November $1.17 and December $1.17.

Q. Could the product of this mine have been sold at the average prices that you have indicated there, if you had had cars to ship it?

A. I could.

41 Q. Mr. Scott, are you able to tell from your connection with the Company what the cost of producing this coal was?

A. Yes sir.

Q. Will you tell us that?

A. In 1902, April it cost 94.9 cents, plus a royalty of 10 cents. May 95.5 cents. We have to add the royalty to all these figures. Royalty of 10 cents. June 92.9 cents. July 92.8 cents. August 93.1 cents. September 97.3 cents. October 97.5 cents. November $1.12 8/10. December 98.8 cents. In 1903, January $1.11 1/10. February $1.21 4/10. March $1.04 6/10. April $1.13 8/10. May $1.06 3/10. June $1.14 1/10. July $1.13. August $1.06 8/10. September $1.09 4/10. October $1.12 3/10. November $1.01 5/10. December $1.14 1/10. 1904, January $1.17 4/10. February $1.07 6/10. March $1.02 7/10. April $1.04 5/10. May $1.00 1/10. June $1.02. July $1.10 1/10. August 96.1 cents. September 96.3 cents. October 92.6 cents. November 98.7 cents. December $1.07 3/10.

Q. Mr. Scott, are you familiar enough with the operation of the mine to state what the effect on the cost is in cutting down your production, not being able to produce your capacity?

A. Of course, that is a running proposition. I could only judge

by using my own judgment. The greater the production would reduce your cost.

Q. Mr. Scott, during the period covered by this action, did you know of the alleged shortage of cars at this mine?

A. Yes, I would receive word of the shortage all the time.

Q. What did you do about that to try to correct it?

A. I used all the efforts I could to get an increased supply.

Q. Who did you approach?

42 A. I went to various men, officials at Broad Street. I think once or twice I visited Mr. Creighton at Altoona.

Q. What railroad was this mine compelled to ship over?

A. The Pennsylvania.

Q. Had it any other outlet?

A. No sir.

Q. When you went to Mr. Creighton what complaint did you make to him?

A. Well the complaint was we weren't getting sufficient cars to take care of the tonnage we could produce at all, not sufficient for our rating.

Q. What reply did he make?

A. Well I can't recall further than he might have said he was doing the best he could.

Q. State whether or not you complained that other people were getting a preference over you?

A. I complained of a special allotment.

Q. To whom?

A. I complained to Mr. Creighton.

Q. Who was this special allotment made for?

A. It was general talk that certain shippers were getting special allotment.

Q. Who were they?

A. Well Berwind-White.

Q. Did you call his attention to the Berwind-White order?

A. I certainly did.

Q. What did you call a special allotment, what do you mean by that?

A. The cars are to be taken out of what they have before they commence distribution.

Q. That is an allotment not made pro rata but arbitrarily, allotment of so many cars made to the individual, in this case it was Berwind-White?

A. Before they commence distribution.

43 Q. The railroad company, state whether or not they had cars enough during the strike to go around and give everybody all the cars they wanted?

A. I wouldn't think so. I don't know.

Q. Well they didn't do it any way?

A. They didn't do it.

Q. And their excuse was they didn't have cars during that stress time, and that is the time is it that they pretended to distribute them pro rata?

A. That is the time the special allotments.
Q. They pretended they were distributing them pro rata?
A. That is right.
Q. And instead of doing that this special allotment was taking out so many cars before any distribution was made?
A. That is correct.
Q. Do you know what this Berwind-White special order was?
A. It varied according to the increase in the production out of their district.
Q. Do you remember of any one particular special order you called their attention to?
A. Five hundred cars a day, I did.
Q. What did they say about that?
A. Well they was always very silent on that subject.
Q. Was you ever at Broad Street Station talking to any of the people about it?
A. I was.
Q. Was you along with John Scott, Jr., when he called the attention of Mr. Trump to this fact?
A. I was with Mr. John Scott, Jr., to visit Mr. Trump one day.
Q. What conversation took place there?
A. We went at the request of Mr. Prevost.
Q. Who was he?
44 A. I think he was Third Vice President. He was one of the Vice Presidents, and after going into the room and after passing the compliments of the day, the first thing Mr. Trump said was, there is no use in bringing up the Berwind-White business, that we are determined to protect that at all hazards.
Q. Had there been previous complaints made to him about this special allotment to Berwind-White?
A. I think there had.
Q. The first thing he said was there was no use in taking that up. What did Mr. Scott say in reply?
A. He replied it was a remarkable statement for an official of the railroad to make, and Mr. Trump's reply was they knew exactly what risks they were taking and were prepared to take them.
Q. From all these complaints did you get any substantial relief?
A. Not any material relief.

* * * * * * *

45 *Letters.*

"December 1, 1902.

"M. Trump, Esq., General Superintendent of Transportation, Pennsylvania Railroad Company, Philadelphia.

"DEAR SIR: We beg to call your attention to the matter of car supply for the Stineman Coal Mining Company, at South Fork, Pennsylvania. Almost two years ago we furnished you with a blue print of the tracks at Stineman No. 1 mine, which are owned by the Stineman Coal Mining Company. We also stated that we were loading 15 cars daily for the Sterling Coal Company on account of the

Stineman Coal & Coke Company. The Stineman Coal & Coke Company were to furnish 15 cars daily or 20 cars at the maximum of Sterling Coal Company or of C. & L. Railroad cars. We would remind you of the fact that the Stineman Coal & Coke Company do not have any control or rights whatever over the storage sidings, and we cannot permit them to be blocked with the empty cars of the Sterling Coal Company while we are shut out entirely of Pennsylvania cars. We would also state that we cannot accept Sterling or C. & L. cars beyond this agreement, and if Pennsylvania cars are not furnished for the balance of our tonnage, we will suspend work at the mines until Pennsylvania cars are supplied. We will not allow the Sterling and C. & L. cars to be stored on our siding.

"Respectfully yours,

"STINEMAN COAL MINING COMPANY.
"GEORGE E. SCOTT, *Manager.*"

"January 30th, 1903.

"George W. Creighton, Esq., General Superintendent Pennsylvania Railroad Company, Altoona, Penna.

"DEAR SIR: We beg to advise you that on and after February 1 we will not load the cars of the Sterling Coal Company or C. & L. Railroad at Stineman No. 1 mine, at South Fork, but will confine the loading to Pennsylvania Railroad cars.

"Respectfully yours,

"STINEMAN COAL MINING COMPANY.
"GEORGE E. SCOTT, *Manager.*"

February 10th, 1903.

"M. Trump, Esq., General Superintendent Transportation P. R. R. Company, Broad Street Station.

"DEAR SIR: Noting from your published list of stations and sidings that the siding at South Fork, known officially as No. 5300, on which siding are the mines of the Stineman Coal Mining Company and the Stineman Coal & Coke Company, and in view of the fact that these two companies are two distinct and separate corporations, with diverse interests and different stockholders, we beg to request that as the coal of the Stineman Coal Mining Company is mined from collieries Nos. 1 and 3 on siding known as No.
46 5300, that your Company designate the sidings of the Stineman Coal & Coke Company with some other number, as it is evident on account of the few P. R. R. cars we receive, there is some confusion or misapprehension in your operating department as to the standing of these two companies, which are distinctly separate to each other in their interests. The Stineman Coal Mining Company only load P. R. R. cars and their allotment, as we understand, is 33 cars per day, and we respectfully ask that the rating be increased to at least 40 cars, as we not only have the capacity but the equipment and the business to take care of this tonnage every day. We make this suggestion in order to work in close touch with your Company, and to avoid any confusion of other interest at South

Fork. In view of the fact that the brick works is on the same siding No. 5300, it seems to us to be advisable to give that company a separate number.

"Respectfully yours,

"STINEMAN COAL MINING COMPANY.
"GEORGE E. SCOTT, *Manager.*"

"February 12th, 1903.

"George W. Creighton, Esq., General Superintendent Pennsylvania Railroad, Altoona, Pennsylvania.

"DEAR SIR: We note by the railroad report that requisition was made at South Fork yesterday for No. 3 mine for Pennsylvania or individual cars. This is certainly in error, as our people at South Fork advise us that such requisition was not filed and the application must have been changed by some railroad man at South Fork. We understand that No. 3 mine has never asked for anything but Pennsylvania cars and we would like you to take it up and see who changes our requisition.

"Respectfully yours,

"STINEMAN COAL MINING COMPANY.
"GEORGE E. SCOTT, *Manager.*"

I read the following telegrams into the record:

"February 4, 1903.

"M. Trump, General Superintendent of Transportation Pennsylvania Railroad Company, Philadelphia, Pa.:

47 "We have following telegram from Stineman Coal Mining Company, Portage. Have not received any cars today. Other mines in this district fairly supplied with Pennsylvania Railroad cars. Railroad people claim they do not have the cars to give us; only reason given.

(Signed) "JAMES S. WHITELEY,
"Vice-President."

"January 25th, 1904.

"M. Trump, General Superintendent Transportation Penna. Railroad Company, Broad Street Station, Philadelphia:

"We have not been getting for the last thirty days cars to work over half the capacity of the Stineman Coal Mining Company No. 1 mine daily. We only received eight steel cars today. We can load twenty steel cars every day at this point. Why is it we do not get them. Please reply.

"JAMES S. WHITELEY, *President.*"

"February 26th, 1903.

"W. W. Atterbury, General Manager Penna. Railroad Company, Broad Street Station, Philadelphia:

"The Stineman Coal Mining Company have received no cars since our conversation Tuesday. In addition to this, Mr. Clark at Altoona

telephoned Mr. Stineman at South Fork last night that he did not expect to give him any cars this week. I regret to annoy you with these matters, but in view of conversation with you think it no more than fair that I should keep you advised of situation as we will have to take some action to protect our interests as far as the attitude of Mr. Trump and his associates is concerned.

"STINEMAN COAL MINING COMPANY."

"December 29th, 1904.

"W. W. Atterbury, General Manager Penna. R. R., Philadelphia, Pa.:

"Stineman reports Altoona says no cars Friday for South Fork. In view of the fact that our neighbors are working, and loaded coal trains are passing South Fork daily, we are forced to believe that your Company fails to appreciate our position as to contracts, and we must request something definite as to your policy toward Stineman Coal Mining Company.

"JAMES S. WHITELEY, *President.*"

"December 31st, 1904.

"W. W. Atterbury, General Manager Penna. R. R., Philadelphia, Pa.:

"Stineman reports no cars at South Fork today. We positively refuse to submit to this treatment without some better explanation than we have heretofore received from your Company. Answer.

"JAMES S. WHITELEY,
"President Stineman Coal Mining Company."

48 GEORGE W. CLARK called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. COLE:

* * * * * * *

Q. Did you know during that period of special orders being issued for the Berwind-White Coal Mining Company?

A. Yes.

Q. Were those orders carried out?

A. No sir.

Q. As far as you had cars to carry them out, were they carried out?

A. Without there were conditions along the railroad that made it impossible for us to carry them out.

Q. When it was possible, they were carried out, were they?

A. When it was possible, they were carried out.

* * * * * * *

49 *Statement by Mr. Cole.*

Mr. COLE: I think under our arrangement that is our case, since we have agreed on the amount of the verdict. Now the defendant can put on the record anything they want.

50 "EXHIBIT D."

* * * * * * *

The complainant alleges that the system under which the defendant distributed its coal cars was unlawful and discriminatory, in that certain classes of cars were furnished to mines in competition with it and not counted against the distributive quota of those mines, which resulted in the giving of more cars to its competitor than it was justly entitled to have. The allegation is not that the defendant made the complainant the object of any special act of discrimination. It did not unfairly apply its system of distribution in determining the number of cars to which the complainant was entitled, nor did it fail to deliver at the complainant's mine the cars to which it was entitled under the scheme in force; but it applied a system or practice which in its working out was unjust and discriminatory to the complainant.

The Commission finds that the method of distribution in force as to all shippers upon the lines of the defendant during the period covered by this complaint was unlawful and discriminatory and has directed the establishment of a different system for the future; but it declines to consider to what extent the complainant has been injured by the application of this practice, and to ascertain and award the damages which, confessedly, must have accrued.

* * * * * * *

51 STINEMAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

STATE OF PENNSYLVANIA,
Eastern District:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the additional portions of the record as required by præcipe filed by Defendant in Error, so full and entire as appears of Record in said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia this 17th day of December, A. D. 1913.

[Seal of the Supreme Court of Pennsylvania, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

52 [Endorsed:] File No. 23,924. Supreme Court U. S., October term, 1913. Term No. 289. The Pennsylvania Railroad Co., Pl'ff in Error, vs. Stineman Coal Mining Company. Additional record ordered to stand as return to writ of certiorari. Filed March 23, 1914.

Endorsed on cover: File No. 23,924. Pennsylvania Supreme Court. Term No. 289. The Pennsylvania Railroad Company, plaintiff in error, vs. Stineman Coal Mining Company. Filed October 30th, 1913. File No. 23,924.

IN THE SUPREME COURT OF THE UNITED STATES.

NO [redacted], OCTOBER TERM, 1913.

[redacted]11

THE PENNSYLVANIA RAILROAD COMPANY,
PLAINTIFF IN ERROR.

vs.

STINEMAN COAL MINING COMPANY,

DEFENDANT IN ERROR

PETITION ALLEGING DIMIMITION OF THE RECORD AND MOTION FOR WRIT OF CERTIORARI.

A. M. LIVERIGHT,
A. L. COLE,
Counsel for Deft. in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

NO 773, OCTOBER TERM, 1913.

THE PENNSYLVANIA RAILROAD COMPANY,
PLAINTIFF IN ERROR.

vs.

STINEMAN COAL MINING COMPANY,

DEFENDANT IN ERROR

PETITION ALLEGING DIMIMITION OF THE RECORD AND MOTION FOR WRIT OF CERTIORARI.

A. M. LIVERIGHT,
A. L. COLE,
Counsel for Deft. in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

The Pennsylvania Railroad Company plaintiff in error	**No. 773, October**
versus	
Stineman Coal Mining Company, Deft. in Error.	**Term 1913.**

Comes now the said defendant in error by A. M. Liveright and A. L. Cole, its counsel and suggests diminution of record in this case, to-wit: That certain evidence of record in the Supreme Court of Pennsylvania is omitted from the transcript on file in this court, that said evidence is indicated as follows:

(1) Testimony of W. I. Stineman pages 2a to 25a inclusive in exhibit "A" attached to praecipe of plaintiff in error.

(2) Testimony of John Scott, Jr., pages 25a to 29a inclusive in the same exhibit.

(3) Testimony of George E. Scott page 33a to cross examination at page 41a of the same exhibit, inclusive.

(4) Letters, beginning at the foot of page 29a with

the words "December 1st, 1902, M. Trump, Esq." and continuing through pages 29a, 30a, 31a, 32a, and 33a, of the same exhibit to the testimony of George E. Scott.

(5) Excerpt from the testimony of George W. Clark, beginning with "Did you know during that period of special orders being issued for the Berwin-White Coal Mining company at page 53a to the words "when it was possible they were carried out" at top of page 54a of the same exhibit.

(6) Statement by Mr. Cole on page 54a of the same Exhibit, reading, "I think under our arrangement that is our case, since we have agreed on the amount of the verdict. Now the defendant can put on the record anything they want.

(7) Excerpt from the defendant's Exhibit "D" in said Exhibit "A" beginning with the paragraph opening "the complainant alleges that the system" at the fifth line at the foot of page 121a and concluding with the words must have accrued" at the middle of page 122a.

That by inadvertence on the part of the defendants in error's attorneys and by a misunderstanding of the rules of this court they were under the impression that they had ninety days from the time of service of the plaintiffs in errors praecipe on them, designating the part of the record to be sent up within which to file their counter praecipe, believing that the proceeding was under rule 9 section 10, and thereby allowed the ten days to expire in which they should have filed their counter praecipe under section 1 of rule 8 of

the Rules of Practice of this court.

That upon discovering their mistake the defendants in error applied to a Justice of the Supreme Court of Pennsylvania, for an enlargement of the time in which to file their counter praecipe, which application was granted by the Honorable John P. Elkin, Justice of said Court as appears by schedule hereto attached, setting forth the order of said justice.

That defendants in error's attorneys are now advised that said order is not effective to make the transcript so returned a part of the record of this court.

That the parts of the record so omitted are material and absolutely essential to the proper understanding and decision of this cause.

WHEREFORE, the said defendant in error moves the court under rule 14 to award a writ of certiorari to be issued and directed to the Judges of the Supreme Court of Pennsylvania, commanding them that searching the record and proceedings in said cause they forthwith certify to this court those parts of said record so omitted as aforesaid.

A. M. LIVERIGHT,
A. L. COLE,
Attorney, Deft. in Error.

CLEARFIELD COUNTY, ss.

Personally came before me the subscriber, A. L. Cole and A. M. Liveright, attorneys for the defendant in error, who being duly sworn, say that the facts

set forth in the foregoing motion are true.

Sworn and subscribed

this day of March 1914.

J. M. BRYAN,
Justice of the Peace

EXHIBIT "A"

IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

Clark Bros. Coal Mining Company
vs.
Pennsylvania Railroad Company
Appellant.
January Term, 1913.
No. 53.

To the Honorable John P. Elkin, Justice of the Supreme Court of Pennsylvania.

15th November, 1913, come A. L. Cole and A. M. Liveright, Attorneys for the Clark Bros. Coal Mining company, defendant in error in the above stated case, and respectfully aver that the plaintiff in error, the Pennsylvania Railroad company, on September 23, 1913 served a copy of the praecipe directed to the Honorable James T. Mitchell, Prothonotary of the Supreme Court of Pennsylvania, indicating the portions of the record it wanted incorporated in the transcript of the record

upon writ of error; that it was impracticable within 10 days thereafter to prepare and lodge with the Prothonotary of the Supreme Court of Pennsylvania the counter praecipe of the defendant in error; that by inadvertance, Counsel for the defendant in error failed within 10 days of service upon them of the praecipe of the plaintiff in error, to obtain an order from the Supreme Court of Pennsylvania enlarging the time for them to file their counter praecipe.

Petitioners aver that it is provided by Section 1 of Rule 10 of the United States Supreme Court that the time for filing such counter praecipe may be enlarged by the Judge of the Court whose decision is made the subject of review, or by a Justice of the United States Supreme Court.

Petitioners further aver that it is important for a proper consideration of the case upon review by the Uinted States Supreme Court that additional portions of the record be incorporated in the transcript of record to be submitted to the Appellate Court.

They therefore respectfully pray your Honor now to make an order enlarging the time for filing their praecipe until the 6th day of December, 1913.

And they will ever pray.

(Signed).

A. M. LIVERIGHT,
A. L. COLE.

State of Pennsylvania

ss.

County of Clearfield.

A. M. Liveright, one of the petitioners being duly sworn acording to law, deposes and says that the matters in the foregoing petition averred are true and correct to the best of his knowledge, information and belief.

(Signed) A. M. LIVERIGHT.

Subscribed and sworn to before me this 15th day of November, 1913.

JAMES K. HORTON,
Notary Public.

EXHIBIT "B".

ORDER OF COURT

day of November, 1913, the foregoing petition of A. L. Cole and A. M. Liveright, Attorneys for the Stineman Coal Mining Company, presented, read and considered, and thereupon it is ordered that the time for filing with the Prothonotary of the Supreme Court of Pennsylvania, the praecipe of said named defendant in error, indicating the additional portions of the record desired by it to be incorporated into the transcript of the record to be filed in the United States Supreme Court, be enlarged to December 6, 1913; and it is further ordered that the additional portions of the record that may be designated by the defendant in error pursuant to leave hereby granted shall be transmitted to the United States Supreme Court as part of the transcript of the record and be therein incorporated.

(Signed). JOHN P. ELKIN.

In the Supreme Court of the United States.

OCTOBER TERM, 1914. No. 289.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Stineman Coal Mining Company.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The Pennsylvania Railroad Company, the plaintiff in error, and defendant below, was during the period of the action a carrier of bituminous coal from mines in Pennsylvania to points both within and without that State, and the Stineman Coal Mining Company, the defendant in error and the plaintiff below, was a shipper over its lines to points both within and without that State.

The Railroad Company throughout the period of the action made a *pro rata* distribution of its coal cars among its

shippers, and the present action was brought to recover damages because of its failure, as alleged, to give to the Coal Company its proper share of the cars which had been distributed

The Railroad Company had made no segregation of its cars as between interstate and intrastate shipments, and under the distribution made the cars delivered to each shipper were available at its election for either interstate or intrastate shipments. (Transcript of Record, page 27.)

As to the use that would have been made of the additional cars which the Coal Company claimed should have been delivered to it, the parties stipulated as follows:—

> "It is admitted by the parties that although substantially all of the plaintiff's coal on account of which recovery is sought would have been sold f. o. b. the mines, that some of it would have been consigned by the plaintiff at the mine to the ultimate consumer at points outside the State of Pennsylvania." (Transcript of Record, page 27.)

The Railroad Company contended that because of the conditions referred to, the State Court was without jurisdiction to entertain the plaintiff's action, and that even if it had jurisdiction of the claim to the extent to which it was based upon the non-receipt of cars which would have been used for intrastate service, cars which would have been consigned by the Coal Company to points outside the State of Pennsylvania should be treated as cars for interstate use even although title to the coal which would have been transported therein would have passed from the Coal Company to the purchaser at the mines at which it was loaded.

These contentions were overruled by the trial Court and by the Supreme Court of Pennsylvania.

Included in the cars which the Railroad Company had delivered to the Coal Company were certain cars owned by the latter, and under the system of distribution which had prevailed during the period of the action, cars of this character were ignored by the Railroad Company in determining the number of its own cars which the Coal

Company was entitled to, and the Railroad Company should have delivered to the Coal Company the same percentage of its own cars which would have been delivered to it had it not received its own private or individual cars.

The propriety of the Railroad Company's system of distribution which thus ignored the individual cars came before the Interstate Commerce Commission in a proceeding instituted by certain shippers on its lines, and the Commission held, to quote from the *syllabus* of that case, as follows:—

> "The Commission reaffirms its previous ruling to the effect that the owner of private cars is entitled to their exclusive use, and that foreign railway fuel cars assigned to a particular mine cannot be delivered to another mine; but it again holds that all such cars must be counted against the distributive share of the mine receiving them." (Transcript of Record, page 42.)

Upon the trial of the present case the parties entered into a stipulation practically to this effect, that if the private cars of the defendant in error should not have been counted as against its distributive share of cars available for distribution, then it was entitled to a verdict for $12,500, but that if these cars should have been counted, then it had received all the cars to which it was entitled, and was consequently not entitled to recover any damages in the present action. (Transcript of Record, page 68.)

The trial Court held that the Railroad Company was bound by the system of distribution which it had in force and was estopped from questioning the right of the defendant in error to all of the cars properly deliverable to it under this system, notwithstanding the fact that the Interstate Commerce Commission had determined that the owners of private cars got an unfair advantage under the system. A verdict, therefore, was entered in favor of the defendant in error under the stipulation referred to, and the judgment entered thereon was affirmed by the Supreme Court of Pennsylvania.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

> "1. The Court below erred in overruling the defendant's motion to dismiss action for want of jurisdiction of the Court below to entertain the same."

2. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

> "2. The Court below erred in refusing to charge as requested in the defendant's first point, which point was as follows:
>
> "'1. The plaintiff is not entitled to recover because this Court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by the Acts of Congress, commonly known as the "Interstate Commerce Acts," in the Federal tribunals.'"

3. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

> "3. The Court below erred in refusing to charge as requested in the defendant's second point, which point was as follows:
>
> "'2. As it is admitted that if the distribution made by the defendant throughout the period of the action had been in accordance with the system or method which the Interstate Commerce Commission has prescribed and defined in the decisions and orders given in evidence as that which should govern the distribution by a carrier of cars, the plaintiff would not have received any more cars than were actually delivered to it by the defendant, the plaintiff is not entitled to recover, and your verdict should be for the defendant.'"

4. The Supreme Court of Pennsylvania ererd in overruling and dismissing the following assignment of error:—

"4. The Court below erred in refusing to charge as requested in the defendant's fourth point, which point was as follows:

"'4. Under the law and the evidence the plaintiff is not entitled to recover.'"

5. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

"5. The Court below erred in overruling the defendant's motion for judgment *non obstante veredicto*."

6. The Supreme Court of Pennsylvania erred in overruling and dismissing the following assignment of error:—

"6. The Court below erred in entering judgment on the verdict in favor of the plaintiff."

ARGUMENT.

Jurisdiction of the State Court to Entertain the Action.

The plaintiff in error, both in the trial Court and in the Supreme Court of Pennsylvania, challenged the jurisdiction of the Court to entertain the action upon the same grounds which formed the basis of its objections in the case of Puritan Coal Mining Company which has been already argued in this Court and in the case of the Clark Brothers Coal Mining Company, which will doubtless have been argued at the time the present case is heard by this Court. We shall not therefore repeat here what has already been presented to this Court in support of our contentions in those cases.

It was duly shown by the testimony in the case that the Railroad Company was both an interstate and intrastate transporter of bituminous coal, and as to the extent to which its coal cars were used interchangeably for both interstate

and intrastate transportation Mr. M. Trump, who during the period of the action had been General Superintendent of Transportation of the plaintiff in error, testified as follows:—

"Q. Were you also familiar with the method of distributing cars by the defendant during those years, to shippers?

"A. Yes, sir.

"Q. Was there but one distribution made, leaving the question of the use of the car as between shipments to points within the State and shipments to points without the State at the option of the shipper?

"A. Yes, sir.

"Q. The Company distributed its cars without any restriction, then, as to the use to which they should be put?

"A. Yes, sir.

"Q. As between intra and interstate shipments?

"A. We didn't know where they were going to when distributed.

"Q. And you didn't prescribe what use the shipper should make of them?

"A. No, sir." (Transcript of Record, page 27.)

DEFENDANT IN ERROR RECEIVED ALL THE CARS PROPERLY DEMANDABLE BY IT.

By the agreement of counsel which will be found at page 68 of the Transcript of Record, it was stipulated that a verdict should be taken in favor of the plaintiff subject to certain questions of law which were thus stated:—

"1st. As to whether or not under the testimony that appears in this case the defendant is bound by the method of distribution of its coal cars that was practiced by it, by which individual cars were not charged against the distributive share of the mine during the period of the action.

"2nd. As to whether or not the rules prescribed by the Interstate Commerce Commission, and their

> various orders which appear of record herein, are controlling in determining what distribution of cars should have been made to the plaintiff, notwithstanding the system of distribution which the defendant at that time practiced; it being the agreement of the parties that, if under the practice, the law and the rules, the plaintiff company should have been charged with individual cars, that then judgment shall be entered in favor of the defendant *non obstante veredicto.*"

It appears, therefore, that the parties agreed that if the defendant in error should have been charged with the individual cars received by it, the final judgment to be entered should be in favor of the plaintiff in error. In effect this stipulation amounts to this; that if the system or method of distributing cars prescribed and enforced by the Interstate Commerce Commission as disclosed by the various reports and orders of that Commission which were given in evidence upon the trial is that which the plaintiff in error in the period of the action should have conformed to, then the cars delivered to the defendant in error comprised all those which it was entitled to. The system or rule of distribution which has been approved by the Interstate Commerce Commission was thus defined by the Commission in the order which it made in one of the earlier cases that came before it, that of Railroad Commission of Ohio *vs.* The Hocking Valley Railway Company. (Transcript of Record, page 64.)

> "It is further ordered, That said defendants be, and they severally are hereby, notified and required to establish, on or before said 15th day of September, 1907, and during a period of at least two years thereafter to maintain and enforce a practice or regulation taking into consideration system cars, foreign railway fuel cars, and leased or so-called private cars in determining the distribution of coal cars among the various coal operators along their lines on interstate shipments of coal and if the number of foreign railway fuel cars or leased or so-called private cars, or both, is less than

> the percentage or proportion of the company to which such cars are consigned or leased, then that company must be given all the foreign railway fuel cars consigned to it and all the cars owned or leased by it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it and the leased or so-called private cars delivered to it is greater than its proportion, all such cars so consigned to it or leased by it must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars must be given full and exclusive use of them, but must not be given in addition thereto a division of the system cars except when its supply of the so-called private cars and of foreign railway fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, and so-called private cars."

And in a proceeding in which the system of distribution pursued by the plaintiff in error was under consideration, the rule promulgated by the Commission which we have quoted above was held by it to be applicable to the plaintiff in error, and an order was made requiring it to take into account all private or individual cars delivered to shippers in the determination of the number of its own cars which should be delivered to them. It was not of course denied by the defendant in error, or by either the trial Court or the Supreme Court of Pennsylvania that the Interstate Commerce Commission was empowered to deal with the question of car distribution and to make whatever orders seemed to it proper in order to bring about a distribution of equipment in times of car shortage which would not offend against the provisions of the Interstate Commerce law.

If there would otherwise have been any doubt as to the existence of this power, the decision of this Court in the case of Interstate Commerce Commission *vs.* Illinois Central R. R. Co., 215 U. S., 452, has made the existence of such a power no longer a disputable question.

It was urged, however, upon behalf of the defendant in error that as there had been no ruling of the Interstate Commerce Commission requiring that private cars of a shipper should be counted in determining his quota of the carrier's cars prior to the expiration of the period of the present action, the rights of the defendant in error were to be determined with reference to the system of distribution which the plaintiff in error had in force during such period regardless of the consideration that this system was thereafter held to be violative of the requirements of the Interstate Commerce Act, and this view or contention was sustained by the trial Court and by the Supreme Court of Pennsylvania.

In the Puritan Coal Mining Company case which is now before this Court, an issue similar to that which we are considering was raised and presented. In that case it was not contended by the Railroad Company that the counting of the individual cars received by the Puritan Company would have established that that Company had received all the cars it was entitled to, but it was contended that it would have very largely reduced the number which the Court found it should have received and upon which the damages were ascertained and based.

In disposing of the issues raised in the Puritan case the Supreme Court of Pennsylvania called attention to the fact that the period of the action antedated any rulings or orders of the Commission which required private cars to be counted, and determined the point in controversy by holding that the Railroad Company under these conditions was estopped from questioning the correctness or legality of the system of distribution which it had itself promulgated and put in force.

That Court also held in that case that the Railroad Company was at fault in not having raised the question of the private cars earlier than it had.

That in that case the Supreme Court of Pennsylvania was of the opinion that if the action of the Commission had antedated the period of the action its findings would have to be accepted as controlling and consequently the private cars would have had to be counted, will hardly be denied, for in its opinion it said:—

> "While proper deference to the Interstate Commerce Commission would require our State Courts to regard the furnishing of private cars as a fair equivalent of the same number of company cars, the fact that such cars were furnished as the pleadings stood in this case was purely a substantive matter of defense."

There can of course in the present case be no such technical question as that to which reference is made in the extract from the opinion just quoted, and it is to be assumed, therefore, that the Supreme Court of Pennsylvania in the present case reached the conclusion that proper deference to the opinion of the Interstate Commerce Commission did not require that the private cars of the defendant in error should be counted solely because of the fact that the Commission had made no deliverance to this effect until after the close of the period of the action.

The view of the Supreme Court of Pennsylvania clearly presupposes that a carrier was not required in order to avoid discrimination or preference prohibited by the provisions of the Interstate Commerce Act, to count private or individual cars as against the quota or allotment of the shippers receiving them and that it did not become its duty to do so until the Interstate Commerce Commission found and declared that such cars must be counted. Upon no other theory or hypothesis, we submit, can the conclusion of the Court be sustained.

The defect or vice of this view is of course that it overlooks or disregards the fact that the finding of the Interstate Commerce Commission that the counting of private cars was necessary to avoid preferential treatment of ship-

pers and any order made thereon, necessarily had as its basis a conclusion or finding upon the part of that body that this was necessary in order that the carrier should conform to the obligations and prohibitions contained in the Interstate Commerce Act.

It results from this consideration that the obligations and prohibitions which in the judgment of the Interstate Commerce Commission required that private cars should be counted were in existence and operative throughout the whole period of the action in the present case, although action by the Commission thereon was not taken until after the close of the period.

If this were not the case and if consequently the rules or system of distribution which the plaintiff in error had in force during the period of the action did not offend against the provisions of the Interstate Commerce Act, where would the Commission have found its authority for interfering with this system? For the power conferred upon it by the Interstate Commerce Act to prescribe regulations to be followed by a carrier in respect to the distribution of its equipment can only be exercised in case the Commission finds an existing regulation or practice to be "unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act."

When the Commission determined the system of distribution which the plaintiff in error in the present case should follow it prefaced its order by a finding that the system which had been in force was unduly discriminatory and preferential, and even if there was any warrant for the view which the Supreme Court of Pennsylvania apparently holds that the reports and orders of the Interstate Commerce Commission can be alone considered in determining whether some practice or regulation of a carrier offends against the provision of the Interstate Commerce Act, why should a distinction be drawn between the effect of a finding of the Commission that past actions or practices are discriminatory, and of an order directing the discontinuance of these in the future?

The Commission itself has not hesitated to make its find-

ings retroactive in the sense that when it has found that a practice or regulation of a carrier was violative of the Interstate Commerce Act it has treated such finding as applicable to the period prior thereto and has awarded damages accordingly. And yet if the finding of the Commission is to be regarded as speaking or operative only from its date, how could such awards of damages be justified?

Both the trial Court and the Supreme Court of Pennsylvania rested their conclusions in part upon the view or theory that the plaintiff in error, having established a system of distribution which it thought for its own interests, was estopped from alleging or proving that this system was not a proper one, notwithstanding the fact that it had been declared improper by the tribunal especially authorized by Congress to pass upon and determine this question.

In the first place it is to be said of this view or theory that it is based upon the wholly inadmissible proposition that a carrier can by its acts or regulations estop itself from denying an undue preference or advantage to a shipper. But irrespective of this consideration there is really no question of estoppel involved in the case. The plaintiff in error under a mistaken view as to the relative rights of shippers assumed that a shipper who was the owner of private cars had a right to the exclusive use of these cars, and that such ownership and use did not debar him from receiving the proportionate part of the carrier's own equipment or cars to which his requirements or demands entitled him. It therefore established and promulgated a system of distribution of its cars which recognized the rights of the private car owner as it had construed them.

But what theory of estoppel can fairly be invoked to prevent the carrier itself from questioning or denying the lawfulness of the system because of its disregard of obligations imposed upon it by the enactments of Congress? If its system did disregard such obligations, the carrier, we submit, was not bound by it nor could any shipper lawfully claim that the system must be enforced for his benefit.

The Supreme Court of Pennsylvania has wholly ignored the consideration that the provisions against discrimination contained in the Interstate Commerce Act are intended to be as effective against shippers as against carriers, and if, therefore, the plaintiff in error's system of distribution which the defendant in error relies upon as the basis for its claim in the present action secured for it an undue advantage of preference, it cannot, we submit, insist upon its right to hold the plaintiff in error accountable to it for non-compliance therewith. And this, we submit, is true, even though as the result of the enforcement of this view, the defendant in error should be deprived of an advantage which may have been extended by the plaintiff in error to other owners of private cars during the period of the action as the result of the delivery to them of all of their private cars and in addition of their quota of its own cars ascertained in accordance with the system of distribution which was then in operation.

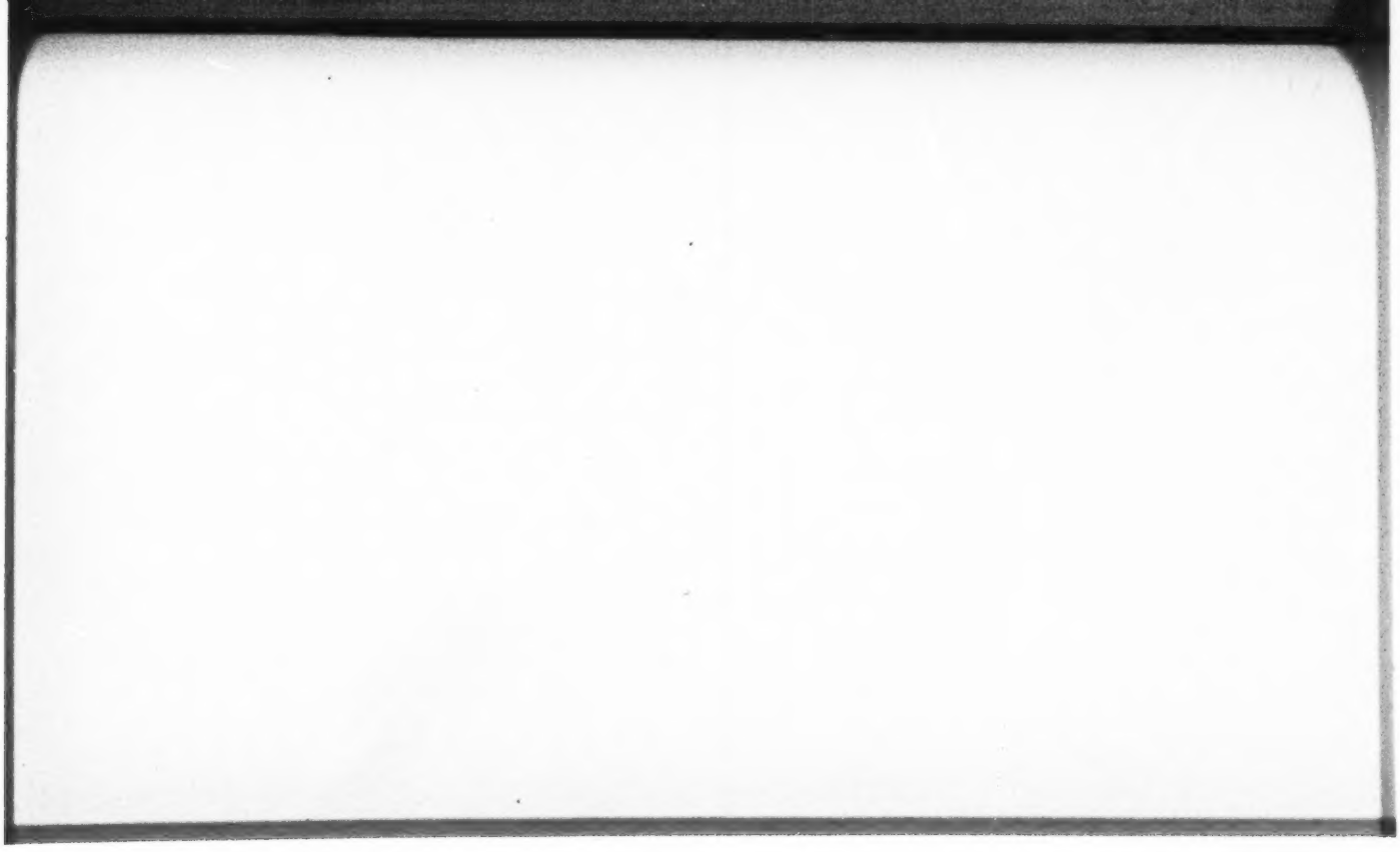
There is no evidence in the present case that these owners did obtain this advantage, but upon the assumption that they did, the defendant in error could not by proof thereof have established a right to the same advantage. To hold otherwise would go counter to the principle determined by this Court in the case of Pennsylvania Railroad Company *vs.* International Coal Mining Company, 230 U. S., 184, that a shipper by proof of an illegal payment to a competitor does not thereby establish a right to secure for himself a like payment. So in the present case the defendant in error would not by proof that cars had been delivered to another shipper to which it was not entitled have established a right on its own part to cars to which it was not entitled. The measure of its right to cars was not the number that might have been delivered to some other shipper, but the proportion to which it was entitled as its fair share of the cars which the plaintiff in error had available for distribution. Of course, excessive deliveries to one shipper would deplete the number available for distribution among other shippers, and would consequently operate to their injury, but

the injury to each one of these other shippers is to be measured not by the over-delivery made to the one, but by the proportion of the cars comprising this over-delivery which would have been available to each shipper.

In the present case the defendant in error admittedly got all the cars that it was justly entitled to. It now claims that it should have received more than its just due, and in support of this contention relies upon the fact that the plaintiff in error had established a regulation which, if carried out, would have given it the cars which it claims it should have received. But if this regulation was itself violative of other shippers' rights, how can it be used as a basis for determining the rights of the defendant in error? Assume for the sake of the argument that the plaintiff in error had entered into an express agreement with every shipper on its lines who owned private cars that it would deliver all of these cars to their respective owners and would not take them into account in determining the number of its own cars which should also be delivered, and that after these agreements had been entered into they had been declared illegal by a competent tribunal. Would any Court think for a moment of enforcing these agreements or of awarding damages because of the breach of them? And yet the case we have put is stronger than that which is presented in the present case, where no contractual obli-obligation of the carrier, but only a practice, is relied upon in support of the claim.

We submit, therefore, that even upon the assumption that the trial Court and the Supreme Court of Pennsylvania had jurisdiction to entertain the action, judgment should have been entered therein in favor of the plaintiff in error.

F. D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Plaintiff in Error.



No. [redacted] 11 October Term, 1914.

IN THE

Supreme Court of the United States.

THE PENNSYLVANIA RAILROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

STINEMAN COAL MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

A. L. COLE,
A. M. LIVERIGHT,
For Defendant in Error.

SUBJECT-INDEX

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THE PENNSYLVANIA RAILROAD COMPANY,

PLAINTIFF IN ERROR,

VS.

STINEMAN COAL MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

COUNTER-STATEMENT OF THE CASE.

This is an action brought by the Stineman Coal Mining Company against the Pennsylvania Railroad Company for tortious discrimination in car supply by and through secret and special orders and other preferential devices accorded a competitor. The performance of those orders resulted in a large excess of cars to the competitor and a restriction of car supply as a consequence to the Coal Company. The period of the action is from April 1, 1902, to January 1, 1905, the location of the complaining operator was upon the Mountain Division of the carrier, between Altoona and Pittsburgh and the favored operator was the Berwind-White Coal Mining company.

Stineman Coal Mining Company operated a certain lease of its own, and as a contractor it loaded on the cars coal mined from an adjoining lease held by the Stineman Coal & Coke Company. The latter was an entirely independent corporation and had mines of its own, but for convenience it contracted with the Coal Company to load the coal of the particular lease over the improvements of the latter.

The Coal and Coke Company until November 1, 1903, had some assigned cars placed at the Coal Company's tipple in which to load the coal taken from the former's lease. The Coal Company had absolutely nothing to do with furnishing or demanding such cars, its only function with reference thereto being to fill them by contract out of the raw material of the Coal & Coke Company.

The Coal Company was absolutely dependent upon the system cars of the carrier for facilities in which to ship its own product and to take care of its own business. It had a large business of its own as a miner and shipper of coal, entirely independent of its contract with the Coal & Coke Company to put coal on the cars for the latter.

At the trial of the case as far as it went defendant-in-error offered substantially the same testimony as was offered by the coal company in the case of Puritan Coal Mining Company against the same carrier, which is now before this Court at number 76 October Term, 1914, on writ of error prosecuted by the Railroad Company. The trial had progressed for a day or two, when an agreement was reached between counsel by which the damages of the Stineman Coal Mining Company were liquidated at $12,500, and a verdict was taken in that amount.

A separate and independent cause of action was included in plaintiff's amended statement, (Transcript of Record, page 17) therein designated as a "second and separate cause of action." This cause of action was abandoned before trial, and no evidence whatever was offered in support of it, nor was it in any way considered in connection with the trial of the case.

The verdict, however, was subject to a record stipulation reserving certain legal questions, to wit, the question of jurisdiction, and the effect upon the case of the practice of the carrier in its distribution of individual cars, together with the effect of rules prescribed by the Interstate Commerce Commission at a subsequent time, alleged by the Railroad Company to be controlling.

The reserved questions were decided in favor of the Coal Company, the trial court and the Supreme Court of Pennsylvania holding that the carrier's practice of distribution of individual cars was a matter foreign to the issue in the one aspect of the case, and that in any event the case was controlled by the practice in effect during the period of the action.

ARGUMENT.

THE CONTROLLING FACTS

The controlling facts of this case make it plain that the individual car question had no bearing on the outcome, and could have none inasmuch as the defendant-in-error received no such cars *on its own account*. For a neighboring operator it loaded said operator's coal at a fixed price per ton, using in that behalf the improvements of it, the defendant-in-error. The neighboring operator was a corporation with an independent status in coal and railroad spheres. For convenience we will term it the Coke Company as distinguished from the Coal Company. The Coke Company caused Cornwall & Lebanon cars to be placed at the Coal Company's tipple in which to dump the product taken from ground by the former held under lease. This arrangement continued until November 1, 1903, when the Coke Company began using its own loading equipment.

To substantiate our assertions we take the following excerpts from the Transcript of Record:

Page 92.

"Q. Now what became of the contract of the Stineman Brothers to load coal on the cars for the Stineman Coal & Coke Company?

A. That was assumed by the Stineman Coal Mining Company on January 1st, 1901.

Q. You say it was assumed. Was it carried out?

A. Yes sir.

Q. What kind of cars were loaded by the Stineman Coal Mining Company out of the coal owned or leased by the Stineman Coal & Coke Company?

A. They were cars furnished by the Sterling Coal Company, *assigned to the Stineman*

Coal & Coke Company. The Stineman Coal Mining Company removed the coal from the lease of the Coal & Coke Company and was supposed to load it in the cars furnished by the Sterling Coal Company to the Stineman Coal and Coke Company.

Q. *Did the Stineman Coal Mining Company have anything to do with obtaining the cars on which this coal was placed?*

A. *The Stineman Coal Mining Company relied entirely upon the Pennsylvania Railroad system cars. No other source of supply.*

Q. Answer the question please. Did the Stineman Coal Mining Company have anything to do with the arrangement or contract for the cars to be loaded for the Sterling Company?

A. No sir.

Q. Between what parties were those arrangements made?

A. Between the Stineman Coal & Coke Company and the Sterling people.

Q. *How did those cars come in?*

A. *They were assigned to the Stineman Coal & Coke Company's mines.*

Q. *By whom?*

A. *By the Sterling Coal Company.*

Q. Where was the Sterling Coal Company situated?

A. Philadelphia.

Q. What classes or characters of cars were these that were loaded for the Sterling Company?

A. Cornwall & Lebanon cars.

Q. What was the arrangement between Stineman Coal Mining Company and the Stineman Coal & Coke Company with reference to the loading of these consigned cars?

* * * * * * * * *

A. The Stineman Coal Mining Company on the coal they mined from the lease of the Coal & Coke Company was loaded in the Sterling cars at a contract price.

* * * * * * * * *

Q. Did the Stineman Coal Mining Company have any interest whatever in the sale of the coal that was loaded in the C. & L. cars for the Coal & Coke Company?

A. Nothing at all.

* * * * * * * * *

Q. Did all the coal for loading of the C. & L. cars come out of coal territory not owned or leased by the Stineman Coal Mining Company?

A. It came from the lease of the Stineman Coal & Coke Company.

Pages 94 and 95.

Q. What was the rating of your mine?

A. 33 cars a day I believe.

* * * * * * * * *

Q. In the spring of 1903 what was its productive ability?

A. Practically about the same tonnage.

Q. 10 or 11,000?

A. Yes, 10 or 11,000 tons.

Q. Is that productive ability entirely apart from what was or could be produced on the Stineman Coal & Coke lease?

A. That is entirely apart from the Stineman Coal & Coke Company lease.

* * * * * * * * *

Q. What kind of cars did you load at the tipple there out of the *Coal Company's* lease?

A. *Pennsylvania cars when we got them.*

Q. *Is that what is known as system cars?*

A. Yes sir.

Q. State whether or not under the rules then in force by the railroad company private cars were counted against distribution?

* * * * * * * * *

A. I understood private cars were not counted against you[illegible] distribution."

It thus becomes manifest that private cars had no place in the case, and constituted an absolutely collateral issue, the defendant-in-error having none of them, controlling none of them, and loading none of them except as above outlined for an independent corporation, out of a distinct and separate property and then only in the capacity of laborer.

So it is apparent that the individual car issue is a phantom, and the stipulation of counsel, apart from the jurisdictional question, has nothing to operate upon. This is peculiarly so, in view of the fact that the agreement of counsel is made dependent upon "the testimony that appears in this case."

To bear us out further we call particular attention to that testimony on page 92 (above quoted) that states unequivocally that the private cars were

"assigned to the Stineman Coal & Coke Company"

and that

"they were *assigned to the Stineman Coal & Coke Company's mines."*

We then invite attention to the phrasing of the Commerce Commission's order (Transcript of Record, page 64) on which plaintiff-in-error rests its case, as excerpted at pages 7 and 8 of its brief. It will appear at a

glance that the distribution rule relied on by the Railroad Company as a set-off concerns consigned or assigned cars, as they relate to the *"company to which such cars are consigned or leased,"* and as they relate to the *"lessee of certain of said so-called private cars and the consignee of foreign railway fuel cars."*

The only issue there was or could be concerned the allegations of unlawful discrimination, and after the testimony was fairly under way, John Scott, Jr., and George Scott having been on the stand (Transcript of Record, pages 111 to 114,) it grew apparent that there was no defense on the merits. Hence the verdict by agreement liquidating the damages.

B

CARRIER'S MISTAKEN LEGAL PROPOSITION

Taking up the technical features of the agreement of counsel, however, just as if the facts of the case warranted a discussion of the rules of distribution—and we feel that we have emphatically demonstrated the contrary—it is to be observed that it does not become a controversy as to whether a rule announced by the Interstate Commerce commission was reasonable or unreasonable. For the Commission had not, during the period of this action, announced the rule that the plaintiff-in-error now invokes. Neither is it a question whether the rule announced by the plaintiff-in-error itself, which was in force either by common consent and acceptance, or by promulgation during the period of the action, was fair or unfair. The real question is whether the defendant-below is *bound by its own rule.*

We contend that the principles announced by the Supreme Court of Pennsylvania in

Puritan Coal Mining Co. vs. Penna. R. R. Co., 237 Pa., 420,

are the law, and we quote therefrom as follows:—

> "The complaint that the Court did not take into account the private or individual cars in determining the extent of the discrimination against the plaintiff introduces *matter foreign to the issue in the case.* The issue had regard to the cars owned by the defendant company. The period of discrimination complained of antedated the decision in the cases of Interstate Commerce Commission vs. Illinois Central R. R. Co., 215 U. S., 452, where it was held to be the duty of the interstate carrier in making distribution of its cars in time of shortage to include in the computation private cars in addi-

tion to its own. In making distribution of its own cars, exclusive of those owned by private parties, the defendant was observing not only its own practice but that which had up to that time been prevailing. However general the practice, it was, as held in the case referred to, in plain violation of the Interstate Commerce Act. In making the present objection the defendant would set up its own disregard and violation of law in mitigation. It had its own purpose to serve in excluding private cars from the computation. Whatever the purpose was, the scheme was acquiesced in by all shippers in the district as fair and equitable, with full knowledge of all facts, since so far as appears none made complaint. *Now that it has been made to appear that the defendant company disregarded its own basis of distribution, not because it was inequitable for the reason that the private cars had not been included in the computation, but solely with a view of giving a particular shipper an unlawful preference, it seeks to mitigate the consequences of its own dereliction by having applied a rule it defied* when it established the basis of distribution upon which all acted throughout the entire transaction"

The facts in the present case are identical, and that it has been made to appear that subsequently to the period of the action the Interstate Commerce Commission disapproved the Railroad Company's rule and declared the proper one to follow, we submit is immaterial.

The defendant-in-error accepted the rule that the Railroad Company said was in force during the period of the action, when it happened to be affected thereby, and now to permit the carrier to repudiate the rule and

to avoid a just judgment thereby, would be to permit it to *take advantage of its own wrong*, after it had reaped whatever benefit it could from the perpetration of said wrong.

The position of the plaintiff-in-error is aptly characterized in the opinion of the Pennsylvania Supreme Court (Transcript of Record, page 80) in the following language:

> "The other defense set up by the defendant to defeat recovery is a little singular to say the least. By the stipulation filed of record by the parties it appears that by the method of distribution of cars among shippers adopted and practiced by the defendant during the period of this action individual cars were not charged against the distribution share of the mine. In violation of this system, discrimination in the distribution was practiced against the plaintiff and in favor of the Berwind-White Coal Mining Company as averred in the statement, resulting in damages to the plaintiff of the stipulated sum of twelve thousand five hundred dollars. The defendant now claims that it is not liable for this discrimination because its own rules of distribution were in violation of the present order or rules of the Interstate Commerce Commission by which the plaintiff's rating would have been charged with its individual cars, and the plaintiff company would then have received all the cars it was entitled to. In other words, the defendant concedes that it ignored its own rules and disregarded its own basis of distribution in furnishing cars to the plaintiff and discriminated against the latter and in favor of a competing shipper, but seeks to justify its unlawful conduct and injury to the plaintiff on the

ground that in making the distribution it had violated a subsequently promulgated order of the Interstate Commerce Commission. We have expressed our views on the merits of such a defense in the Puritan case in which the present defendant being also the defendant in that case unsuccessfully attempted under like circumstances to avoid liability for similar discriminatory acts on the same ground."

The Railroad Company's attitude is also defined in the vigorous language of the trial judge, in his opinion overruling the motion for judgment in favor of the plaintiff-in-error (Transcript of Record, page 76), as follows:—

"The Railroad Company saw fit during the period of the action of this case to adopt and carry into effect a rule of distribution excluding private cars from computation in charging against the individual shipper. It then proceeded to distribute its unassigned or system cars to the several shippers along its lines according to their rated capacity. This undoubtedly gave a great preference and advantage to the shipper owning individual cars. Having adopted it, however, can it now either in mitigation or as a complete offset to a claim for damages get immunity because of such apparent inequitable practice? To do so would put a premium on its own wrong-doing. It may well be assumed that the preferred shipper likewise used individual and assigned cars. The complaint sued for is distinctly against the practice of discrimination as to unassigned or system cars, as to which the verdict establishes the fact of such discrimination. Under the then prevailing practice of the

defendant company the plaintiff may have been forced to buy, lease or otherwise arrange for individual cars as a matter of self protection against the very discrimination alleged. If it could not get system cars, it may have been obliged to resort to individual cars to maintain its standing as a coal operator. To buy or lease cars meant an outlay of considerable money. To get individual cars from other operators, as is often done, and seems to be indicated by some of the testimony offered in this case, usually involves a sacrifice to some extent of the price to be received. As we look at it, therefore, the question of the individual cars used by the plaintiff does not enter into the issue involved in this case and certainly should not be used to deprive plaintiff of the damages agreed on as measuring the injury sustained by plaintiff because of its being deprived of its pro rata share of system cars."

THE AGREEMENT OF COUNSEL

The stipulation of counsel sets forth an agreement "that if under the practice, the law and the rules, the plaintiff company should have been charged with individual cars," judgment should be entered for defendant, n. o. v.

Under the practice individual cars were not charged against distributive share of any mine. Had it been stipulated that *notwithstanding* the practice the rules promulgated several years later by the Interstate Commerce Commission should govern, except for the considerations hereinbefore noted, there might possibly have been some slight plausibility in asking judgment for the carrier; but in the face of the language of the agreement, and its own practices, we respectfully contend that plaintiff-in-error has taken itself out of court.

Looking at the carrier's proposition from another viewpoint we find the Pennsylvania Railroad Company in the position of seeking, against a judgment founded upon a pure and simple tort, to set off another tort of which it admits it was guilty. It says, figuratively, true it is that I grievously wronged you in the distribution of system cars, but I also erred in my distribution of individual cars. *Ergo*, your judgment cannot stand. This is a novel application of the law of set-off. It had been our impression that a set-off was not assertable in an action of trespass, even though in morals it were a just counterclaim. *A fortiori*, must it be impossible to use a *tort as a set-off to a tort.*

The sophistries of the argument of the plaintiff-in-error are transparent. It first *assumes* that the Coal Company secured an undue advantage or preference through the system of distribution in force during the period of the action, and then insinuates that we try to hold the carrier accountable in damages for non-compliance with such system. All of this is pure invention as we have heretofore endeavored to show. The next

step takes the carrier easily and naturally to the point of suggesting that because another shipper had gotten cars to which it was not entitled the defendant-in-error should not recover on the basis of cars to which it was not entitled, citing Pennsylvania Railroad Company vs. International Coal Mining Company, 230 U. S., 184, in support.

The all-embracing answer to such absurdity is that no such measure of recovery was sought, allowed or even remotely considered. In the case at bar, the defendant-in-error did not admittedly get all the cars it was justly entitled to as suggested by counsel at page 14 of their brief. The contrary is true, and its recovery is measured as in the Puritan case, by its proportion of the over-delivery to favored competitors, said competitors operating substantially all the mines on the competitive division to which said excess cars were granted and distributed.

The jurisdictional question involved is similar to that in the Puritan case, in which it has been fully treated, and we shall not again inflict our views upon the Court.

We respectfully submit that the judgment should be affirmed.

A. L. COLE,
A. M. LIVERIGHT,
For Defendant in Error.